

# THE CONSTITUTIONAL RIGHT TO FOOD IN SOUTH AFRICA

by

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## SUMMARY

This dissertation is a study of the ambit of the right to food as it is contained in the South African Bill of Rights and the steps needed to realise the right. Existing and potential food insecurity, hunger and malnutrition provide the social context for this research.

The rationale for conducting the research is primarily two-fold. Firstly, the access to sufficient food is an indispensable right for everyone living in this country. Secondly, the right to food in South Africa has not been subject to extensive academic study to date.

Socio-economic rights are fully justiciable rights in this country, equally worthy of protection as civil and political rights. Furthermore, socio-economic rights (like the right to food) are interdependent with civil and political rights: neither category can meaningful exist without realisation of the other.

The right to sufficient food is found in section 27(1)(b) of the South African Constitution. Children have the additional right to basic nutrition in terms of section 28(1)(c). The right to sufficient food is subject to the internal limitation of section 27(2) that the state must take reasonable measures, within its available resources, to achieve the progressive realisation of the right. Furthermore, as with all rights in the Bill of Rights, both these rights are subject to the general limitations clause found in section 36. There is international law authority in various human rights instruments for the protection of the right to food and what the right entails. In accordance with section 39 of the Constitution, such international law must be considered when interpreting the right to food. It is argued that a generous and broad interpretation of food rights in the Constitution is called for.

Existing legislation, state policies and programmes are analysed in order to gauge whether the state is adequately meeting its right to food obligations. Furthermore, the state's food programmes must meet the just administrative action requirements of lawfulness, reasonableness and procedural fairness of section 33 of the Constitution and comply with the Promotion of Just Administrative Justice Act. The dissertation analyses the disparate and unco-ordinated food and law policies in existence, albeit that the National Food Security Draft Bill offers the hope of some improvement. Particular inadequacies highlighted in the

state's response to the country's food challenges are a lack of any feeding schemes in high schools and insufficient food provision in emergency situations. Social assistance grants available in terms of the Social Assistance Act are considered due to their potential to make food available to grant recipients. On the one hand there is shown to be a lack of social assistance for unemployed people who do not qualify for any form of social grant. On the other hand, whilst presently underutilised and not always properly administered, social relief of distress grants are shown to have the potential to improve access to sufficient food for limited periods of time. Other suggested means of improving access to sufficient food are income generation strategies, the introduction of a basic income grant and the creation of food framework legislation. When people are denied their food rights, this research calls for creative judicial remedies as well as effective enforcement of such court orders. However, it is argued that education on what the right to food entails is a precondition for people to seek legal recourse to protect their right to food.

Due to a lack of case authority on food itself, guidance is sought from the findings of South Africa's Constitutional Court in analogous socio-economic rights challenges. Through this analysis this dissertation considers the way forward, either in terms of direct court action or via improved access to other rights which will improve food access.



## **KEY WORDS**

1. Constitutional law
2. Human rights
3. Socio-economic rights
4. Food
5. Nutrition
6. Poverty relief
7. South Africa
8. International law
9. Children's' rights
10. Rights enforcement

# CHAPTER 1

## INTRODUCTION: THE NATURE, EXTENT AND STRUCTURE OF THE STUDY

### 1.1 BACKGROUND

The father of democratic South Africa, Nelson Mandela said:

“We do not want freedom without bread, nor do we want bread without freedom. We must provide for all the fundamental rights and freedoms associated with a democratic society ...”<sup>1</sup>

Poverty is a reality for a large percentage of the South African population.<sup>2</sup> This research focuses on one aspect of poverty, namely hunger and malnutrition, from a legal perspective. It has been said that “the idea of social security is that of using social means to prevent deprivation and vulnerability”.<sup>3</sup> In accepting this definition of social security, it is submitted that food provision for those in need forms a crucial part of a state’s social security law obligations. This dissertation will attempt to establish the ambit of the right to food as it is contained in the Bill of Rights and the steps needed to realise the right. The key provisions are sections 27(1)(b) and 27(2) of the Constitution.<sup>4</sup> Section 27(2) read with section 7(2) of the Constitution clearly indicate that the state must respect, protect and promote socio-economic rights. However, there is the caveat in section 27(2) in that the state’s obligation to provide the listed socio-economic rights (including food) is subject to its available resources. Although this research will focus primarily on the right to food as contained in section 27, the

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<sup>1</sup> Mandela “Address: on the occasion of the ANC’s Bill of Rights Conference”. Quoted in Nthai “Implementation of Socio-economic Rights in South Africa” (1999) *De Rebus* 41.

<sup>2</sup> May *Poverty and Inequality in South Africa* (1998) defines poverty as:  
“the inability to attain a minimal standard of living, measured in terms of basic consumption needs or the income required to satisfy them”.

In terms of this government report, in 1998 just under 50% of South Africa’s population fell below a poverty line of a monthly household expenditure level of R353 per adult equivalent. Accessed at <http://www.polity.org.za/html/govdocs/reports/poverty.html> on 5 June 2005. According to the so-called Taylor Commission the number of South Africans living in poverty depends on the poverty line used and on that basis between 20 and 28 million people are living in poverty. Taylor, V *et al Transforming the Present – Protecting the Future* (2002) at 28-29. Although there may be debate as to the yardstick for measuring poverty in South Africa, it is not debatable that poverty is a reality for a large percentage of South Africans.

<sup>3</sup> Dreze & Sen “Hunger and Public Action” (1989) 15 cited in Olivier, Okpaluba, Smit and Thompson (eds) *Social Security Law - General Principles* (1999) 21 footnote 1.

<sup>4</sup> The Constitution of the Republic of South Africa, 1996 (the Constitution).

right of children to basic nutrition in section 28(1)(c) will also be considered. The right of prisoners to adequate nutrition in section 35(2)(e) falls beyond the scope of this research.<sup>5</sup> There are various other constitutionally protected socio-economic rights,<sup>6</sup> but these fall outside the proposed direct scope of this work. Due to the interrelatedness of socio-economic rights, this dissertation will not, however, consider the right to food in isolation. For example, there is a clear link between the provision of social assistance grants and the ability of hungry people to eat.

During the course of this research the terms “right to food” and “right to nutrition” will be used interchangeably. It is submitted that Olivier *et al* are correct to argue that to debate the distinction serves little purpose as both food and nutrition are necessary for all human beings.<sup>7</sup>

While the focus of this research is what constitutes the right to food and the corresponding duties needed to meet those rights, it is necessary to some degree to discuss what government is currently doing to alleviate hunger in South Africa in order to assess compliance with its constitutional obligations. De Vos highlights that the duties imposed by economic, social and cultural rights are to respect, protect, promote and fulfil these rights.<sup>8</sup> There is no point in having a mere paper right without the obligation to enforce or implement that right. It is for this reason that the duties incumbent on the state to meet the right to food will be considered. The state will have failed in its right to food obligations if its duties are not converted into reasonable and effective policies. A discussion of current government policies and programmes accords with Engh’s argument that one must understand what currently exists in order to establish what has to be developed to better realise socio-economic rights.<sup>9</sup>

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<sup>5</sup> The logic for the exclusion of the food rights of prisoners from this study is that the rights of prisoners in general forms an area worthy of research on its own. The peculiar needs and circumstances of all detained persons make their socio-economic needs and the provision thereof distinctly distinguishable from the provision of socio-economic rights for the general population.

<sup>6</sup> Rautenbach; Jansen van Rensburg and Venter (eds) *Politics, Socio-economic Issues and Culture in Constitutional Adjudication* (November 2004) 64. These authors indicate that the rights to education, food, land, housing, health care, water, social security and welfare are all examples of justiciable socio-economic or second-generation rights.

<sup>7</sup> Olivier, Smit and Kalula *Social Security: A Legal Analysis* (2003) 545.

<sup>8</sup> De Vos “A New Beginning? The Enforcement of Social, Economic and Cultural Rights under the African Charter on Human and Peoples’ Rights” *Law Democracy & Development* Vol 8 (2004) (1) 19. In this regard De Vos is focusing on s 7(2) of the Constitution in so far as it relates to all rights in the Bill of Rights.

<sup>9</sup> Engh “Developing Capacity to Realise Socio-Economic Rights. The Example of HIV/Aids and the Right to Food in South Africa” *ESR Review* Vol 5 No 3 (2004) 3.

## 1.2 EXTENT OF THE STUDY

It is necessary to define what the right to food means before one can logically discuss the extent of a study on the right to food. A useful definition of realisation of the right to food is given in General Comment 12 of the United Nations Economic and Social Rights Committees which says:

“The right to food is realised when every man, woman and child, alone or in community with others, has physical and economic access at all times to adequate food or means for its procurement.”<sup>10</sup>

The concept of food security is often used interchangeably with the concept of realising the right to food. The Rome Declaration on Food Security explains food security in the following terms:

“Food security exists when all people, at all times, have physical and economic access to sufficient, safe and nutritious food to meet their dietary needs and food preferences for an active and healthy life.”<sup>11</sup>

The main purpose of this research is to discuss the constitutional obligations of the state in relation to the right to food in South Africa.

In attempting to meet the aforementioned objective, this research aims to answer the following key questions. What does the right to food in terms of the South African Constitution entail, and what corresponding duties are imposed on government in terms of the right? Is the state meeting its constitutional obligations in this regard?

The research is undertaken in the field of constitutional law with a focus particularly on the right to food and, to a lesser extent, just administrative action.

In attempting to answer the stated key questions, the status of the right to food in terms of international law is considered.<sup>12</sup> Malherbe highlights the usefulness of considering international law sources in the context of socio-economic rights by arguing that:

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<sup>10</sup> United Nations Economic and Social Rights Committee *General Comment 12 The Right to Adequate Food* UN Doc E/C/12/1999/5 (1999) para 6.

<sup>11</sup> The Rome Declaration on Food Security. Cited in Khoza “Realising the Right to Food in South Africa: Not by Policy Alone- A Need for Framework Legislation” (2004) Vol 20 *SAJHR* 670.

<sup>12</sup> S 39(1)(b) of the Constitution prescribes the use of International law as an interpretative tool.

“The dearth of local jurisprudence on social security rights makes it inevitable that international and comparative standards will be used to offer guidance on the interpretation of national legislation.”<sup>13</sup>

### 1.3 THE SIGNIFICANCE OF THE STUDY

It is submitted that there are few challenges, if any, as crucial to post-apartheid South Africa as that of poverty alleviation.<sup>14</sup> May’s 1998 Summary Report on Poverty and Inequality notes that most South African households either live in poverty or are continually vulnerable to being poor.<sup>15</sup>

It has been averred that the study of social security as a human right is worthy of continued research.<sup>16</sup> Taking this viewpoint further, it is argued that a study of the right to sufficient food and adequate nutrition, which is one of the most basic of all human needs, warrants further study. The importance of food security is heightened by the ravages of the HIV/ Aids pandemic in South Africa, in that a loss of part of the agricultural labour force due to the disease is very likely to reduce the country’s ability to ensure that everyone in the country is adequately fed.<sup>17</sup> Furthermore, time and money spent on HIV/ Aids reduces peoples’ ability to feed themselves. Conversely, food insecurity and poor nutrition increase peoples’ susceptibility to contracting HIV and the more rapid development of Aids from HIV.<sup>18</sup> The clear link between food security and HIV/ Aids means that workable solutions for properly

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<sup>13</sup> Malherbe “The Co-ordination of Social Security Rights in Southern Africa: Comparisons With (and Possible Lessons to be Learnt From) the European Experience” *Law Democracy & Development* Vol 8 2004(1) 80.

<sup>14</sup> Because poverty is undeniably linked with hunger and malnutrition, it is apposite to note the estimated extent of poverty in South Africa. According to Aliber, between 45% and 55% of South Africans are estimated to be poor, while about 70% of rural South Africans live in poverty. Aliber “Chronic Poverty in South Africa” (2003) 31(3) *World Development*. Cited in Coomans & Yapko “A Framework on the Right to Food- An International and South African Perspective” (2004) 4 *African Human Rights Law Journal* 29.

<sup>15</sup> May *Poverty and Inequality in South Africa*. Accessed at <http://www.polity.org.za/html/govdocs/reports/poverty.html> on 5 June 2005.

<sup>16</sup> Govindjee *The Constitutional Right to Social Assistance as a Framework for Social Policy in South Africa: Lessons from India* (2005) 2, unpublished, Nelson Mandela Metropolitan University LLD thesis.

<sup>17</sup> Engh indicates that the United Nations Food and Agricultural Organisation has estimated that 4% of South Africa’s agricultural labour force has been lost to Aids by 2000 and that this figure could rise to 20% by 2020. Engh “Developing Capacity to Realise Socio-Economic Rights. The Example of HIV/Aids and the Right to Food in South Africa” 3.

<sup>18</sup> Engh “Developing Capacity to Realise Socio-Economic Rights. The Example of HIV/Aids and the Right to Food in South Africa” 3.

meeting everyone's right to food will have positive spin-offs in attempting to minimise the harm of HIV- Aids.

The significance of this study becomes more apparent when one considers available statistics on the extent of malnutrition and food insecurity in South Africa. It has been estimated that 36%<sup>19</sup> of the South African population (which equates to more than 14 million people) are vulnerable to food insecurity.<sup>20</sup> Food insecurity and malnutrition are geographically and demographically unevenly distributed, with food insecurity highest in provinces with large rural populations<sup>21</sup> and amongst black households.<sup>22</sup> Food insecurity and malnutrition in particular areas prompted the holding of two national food security workshops in 2002.<sup>23</sup> The elderly, women and children<sup>24</sup> are the most vulnerable to these food problems.<sup>25</sup> According to Engh's research, about 20 to 25% of South African pre-school children and 20% of primary school learners are chronically malnourished.<sup>26</sup>

Coomans and Yapko see the right to food as having keys links with another controversial issue in modern South Africa, namely land reform.<sup>27</sup> In the context of the relatively slow pace of land reform since the dawning of the democratic era in this country, the need to effectively realise the right to food might provide a basis for a more effective agricultural land reform process. Whilst not wanting to get into the merits of this argument at this

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<sup>19</sup> The Integrated Food Security Strategy for South Africa places this figure at between 35% and 39%. Accessed at [www.nda.agric.za/docs/Foodsecurity/FinalIFSS](http://www.nda.agric.za/docs/Foodsecurity/FinalIFSS) on 25 February 2006.

<sup>20</sup> Khoza "Realising the Right to Food in South Africa: Not by Policy Alone - A Need for Framework Legislation" 664. This figure was also cited by Brand in noting a 1998 report of the United Nations Food and Agriculture Organisation. Brand "The Right to Food" in Brand and Heyns (eds) *Socio-Economic Rights in South Africa* (2005) 153.

<sup>21</sup> The Limpopo Province, for example, has been identified as an area with widespread malnutrition and food insecurity. Khoza "Workshop on the Right to Food Security" 23. See also Statistics South Africa *Rural Survey* (1999) at 15, which note this unevenness of development.

<sup>22</sup> Khoza "Realising the Right to Food in South Africa: Not by Policy Alone- A Need for Framework Legislation" 664. Again, see also Statistics South Africa *Rural Survey* (1999) at 15, which also reflects this phenomenon.

<sup>23</sup> *Ibid.*

<sup>24</sup> 21.6% of children under nine years are stunted, 10.3% underweight and 3.7% experience wasting. Brand "The Right to Food" in Brand and Heyns (eds) *Socio-Economic Rights in South Africa* 153 citing research by Labadarios (ed) *The National Food Consumption Survey* (1999).

<sup>25</sup> Khoza "Realising the Right to Food in South Africa: Not by Policy Alone- A Need for Framework Legislation" 265.

<sup>26</sup> Engh "Developing Capacity to Realise Socio-Economic Rights. The Example of HIV/Aids and the Right to Food in South Africa" 5.

<sup>27</sup> Coomans & Yapko "A Framework on the Right to Food- An International and South African Perspective" 29.

introductory stage, it is sufficient to note that the right to food is inextricably linked with various other vital challenges in our society today.

The right to social security has already been the subject of much research.<sup>28</sup> However, there has been surprisingly little research into the right to food in South Africa, especially compared to various other socio-economic rights like access to health care or housing. When one considers that food is one of the most crucial and immediate of human needs, a legal analysis of the right to food in South Africa would appear to be called for. The importance of the study is heightened by the constitutional right to food not yet having been tested before our courts. Brand considers the constitutional right to food as a potentially significant way for the poor of South Africa to ensure access to their food needs.<sup>29</sup> This untested and somewhat uncharted nature of the right in South African jurisprudence makes this research all the more exciting and worthwhile.

#### **1.4 STRUCTURE OF THE STUDY AND RESEARCH METHODOLOGY**

In terms of content analysis, the focus of the research is on the relevant rights and duties contained in the Constitution. A large range of literature from articles, textbooks, cases, reports and the Internet is used to inform this research. Whilst no empirical research is undertaken, a conscious effort is made to produce a relevant study, rather than merely an academic exercise.

Critical analysis in this study focuses on court decisions and existing government projects and programmes. The analysis of state projects and programmes considers the policies as contained in policy documents and academic critique of the implementation of the projects and programmes.

This study begins with the justiciability of socio-economic rights generally,<sup>30</sup> which places the right to food in its proper context. Thereafter the right to food and supporting, interrelated

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<sup>28</sup> For example, Olivier *et al* provide authority for the fact that it is now trite that socio-economic rights in South Africa are justiciable. Olivier; Smit and Kalula *Social Security: A Legal Analysis* 545.

<sup>29</sup> Brand “The Right to Food” in Brand and Heyns (eds) *Socio-Economic Rights in South Africa* 153.

<sup>30</sup> Pieterse “Coming to Terms With Judicial Enforcement of Socio-economic Rights” (2004) Vol 20 *SAJHR* 384 cites the *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744, *Government of the Republic of*

constitutional rights are examined.<sup>31</sup> International law is considered in so far as it sheds light on the content of the right to food.<sup>32</sup> The international law study focuses on international human rights instruments. As state provision of food and adequate nutrition is an administrative action, an analysis of the right to just administrative action is also made.<sup>33</sup>

The next section analyses what government is currently doing to alleviate hunger in South Africa in order to assess compliance with its constitutional obligations. Part of this process considers whether there is just administrative action in relation to its food and nutrition programmes.<sup>34</sup>

The research then shifts towards an analysis of the enforcement of socio-economic rights in South Africa by the courts and the South African Human Rights Commission. The majority of the Chapter focuses on the major South African court decisions in the area of the provision of social and economic rights. It is worth reiterating that this dissertation aims to focus on the right to food, not other forms of social security and social assistance, such as the right to health care. However, the right to food has yet to come authoritatively before our courts. Hence, leading court decisions relating to the provision of other socio-economic rights are discussed due to the interrelatedness of the provision and enforcement of different socio-economic rights.<sup>35</sup> Attempts are then made to draw parallels between these cases and a hypothetical right to food challenge as well as the implications of these decisions for government's food policies.

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*South Africa v Grootboom* 2000 (11) BCLR 1169 (CC) and *Minister of Health v Treatment Action Campaign* 2002 (5) SA 703 (CC) and 2002 (5) SA 721 (CC) judgments as authority for the fact that socio-economic rights are now clearly justiciable. The earlier debate as to whether socio-economic rights should be enforced by South Africa's courts has therefore now been replaced with the pressing question of how such enforcement should occur.

<sup>31</sup> For example, s 28(1)(c) of the Constitution provides that "every child has the right to ... basic nutrition ...".

<sup>32</sup> In relation to the interpretation of the right to social security in s 27 of the Constitution (and all other rights in the Bill of Rights), s 39 (1)(b) requires consideration of international law.

<sup>33</sup> S 33 of the Constitution provides for the right to just administrative action.

<sup>34</sup> The Promotion of Administrative Justice Act 3 of 2000 and the Promotion of Access to Information Act 2 of 2000, which promote proper administrative action in general, will be considered in so far as they relate to the right in question.

<sup>35</sup> For example, *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC) and *Minister of Health v Treatment Action Campaign (1)* 2002 (5) SA 703 (CC). These decisions will be discussed later in this dissertation.



Finally, the discussions are concluded and proposals made concerning improving the current provision of adequate food within South Africa's available resources.

## **CHAPTER 2**

### **THE JUSTICIABILITY OF SOCIO-ECONOMIC RIGHTS IN SOUTH AFRICA**

#### **2.1 INTRODUCTION TO CHAPTER**

The Constitution is supreme and contains justiciable rights.<sup>36</sup> The focus of the Chapter is the justiciability of socio-economic rights. This will include the issues of limitations of rights as well as constitutional jurisdiction, access to court and *locus standi*. The right to food and interconnected rights will be analysed in the next Chapter.

#### **2.2 CONSTITUTIONAL SUPREMACY AND THE JUSTICIABILITY OF SOCIO-ECONOMIC RIGHTS**

Section 2 of the Constitution clearly indicates the supremacy of the Constitution.<sup>37</sup> Furthermore, Section 7(1) points to the Constitution's role as the fulcrum around which the new wheel of democratic South Africa turns.<sup>38</sup> Section 7(2) requires the state to:

“respect, protect, promote and fulfil the rights in the Bill of Rights”.

Before the adoption of the Final Constitution, there was much debate as to whether socio-economic rights should be included in the Bill of Rights. Writers like Haysom argued for the inclusion of socio-economic rights in the Constitution on the basis that having first generation rights, like the right to vote, without second generation rights, like the right to food, would provide a hollow constitutional democracy.<sup>39</sup> Haysom pointed out that the recognition of the indivisibility and interdependence of socio-economic rights had already been recognised in

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<sup>36</sup> S 2 of the Constitution.

<sup>37</sup> S 2 states:

“This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.”

<sup>38</sup> S 7(1) states:

“The Bill of Rights is the cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.”

<sup>39</sup> Haysom “Constitutionalism, Majoritarianism Democracy and Socio-economic Rights” (1992) Vol 8 *SAJHR* 451.

international law.<sup>40</sup> There is recognition in international human rights law of the equal status of socio-economic rights with civil and political rights and the intimate linkages which exist between these two categories of rights.<sup>41</sup> Nthai's rationale for the inclusion of socio-economic rights in a constitution was that the enforcement of first generation rights only gave an appearance of equality and justice, whilst impliedly socio-economic inequality were entrenched.<sup>42</sup> Against the aforementioned viewpoints, Davis and others argued that the inclusion of socio-economic rights in the Constitution (which are not accepted worldwide as justiciable rights) would result in the inclusion of unenforceable rights in the Bill of Rights and would blur the separation of powers doctrine.<sup>43</sup>

The inclusion of socio-economic rights in the Constitution makes it clear that socio-economic rights are now justiciable.<sup>44</sup> The Constitutional Court has on a number of occasions held socio-economic rights to be genuine and enforceable rights.<sup>45</sup> The clear justiciability of socio-economic rights in the Constitution is further emphasised by there being no hierarchy of rights in the Bill of Rights: these second-generation rights stand side by side in Chapter 2 of the Constitution with first-generation rights. Heyns and Brand argue that this structure of how rights are listed in the Bill of Rights illustrates the indivisibility and interdependence of first-, second- and third-generation rights.<sup>46</sup> The earlier debate as to whether socio-economic

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<sup>40</sup> This recognition was to be found in the United Nations Centre for Human Rights' *Right to Adequate Food as a Human Right* (1989) 50. Cited by Haysom "Constitutionalism, Majoritarianism Democracy and Socio-economic Rights" 451.

<sup>41</sup> Haysom "Constitutionalism, Majoritarianism Democracy and Socio-economic Rights" 451.

<sup>42</sup> Nthai "Implementation of Socio-economic Rights in South Africa." 4.

<sup>43</sup> Davis "The Case Against the Inclusion of Socio-economic Demands in a Bill of Rights Except as Directive Principles" (1992) Vol 8 Part 4 *SAJHR* 475.

<sup>44</sup> Rautenbach; Jansen van Rensburg and Venter (eds) *Politics, Socio-economic Issues and Culture in Constitutional Adjudication* 64. These authors indicate that the rights to education, food, land, housing, health care, water, social security and welfare are all examples of socio-economic or second-generation rights.

<sup>45</sup> Pieterse "Coming to Terms With Judicial Enforcement of Socio-economic Rights" 384 cites the *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744, *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC) and *Minister of Health v Treatment Action Campaign (1) and (2)* 2002 (5) SA 703 (CC) and 2002 (5) SA 721 (CC) judgments as authority for the fact that socio-economic rights are now clearly justiciable. Yacoob sums up the clear status of socio-economic rights as justiciable in *Grootboom* by holding (at paragraph 20) that:

"[w]hile the justiciability of socio-economic rights has been the subject of considerable jurisprudential and political debate, the issue of whether socio-economic rights are justiciable at all in South Africa has been put beyond question by the text of our Constitution as construed in the Certification judgment."

<sup>46</sup> Heyns and Brand "Introduction to Socio-economic Rights in the South African Constitution" in Bekker (ed) *A Compilation of Essential Documents on Economic, Social and Cultural Rights: Economic and Social Rights Series* Vol 1 (June 1999) 2.

rights should be enforced by South Africa's courts has therefore now been replaced with the pressing question of *how* such enforcement should occur. The question of *how* such enforcement should occur will thus be this writer's focus, rather than reopening a debate which is essentially of historic interest only.

Whilst not revisiting the old debate as to the justiciability of socio-economic rights, a consideration of some of the main arguments made in favour of their justiciability is relevant in so far as they may suggest ways of better realising socio-economic rights (in particular the right to food) today. Haysom correctly argues that a constitutional democracy needs both political/ civil rights and socio-economic rights.<sup>47</sup> Taking this point further, it is submitted that the type of constitutional democracy Haysom advocates requires all categories of constitutionally protected rights to be accessible to the people and to make a tangible difference in their everyday lives. There is a need for all rights in the Constitution to have substance. If this is not the case then the constitutional democracy which was so hard-fought to achieve in South Africa provides little more than rhetoric. Therefore proposals to better realise socio-economic rights in South Africa need to focus on changing the lives of those who live in South Africa for the better. This argument accords with Haysom's widely accepted view that:

“for a constitution to have a meaningful place in the hearts and minds of the citizenry, it must address the pressing needs of ordinary people.”<sup>48</sup>

Haysom penned these words in the pre-constitutional era when inclusion of socio-economic rights in a supreme constitution was his aim. Now that South Africa has a well established constitutional dispensation with clearly justiciable socio-economic rights, the challenge shifts towards translating rights into reality. Along similar lines, Haysom highlights the link between the realisation of socio-economic rights and realising core first generation rights like equality and dignity.<sup>49</sup> In other words, without access to socio-economic rights like food and health care, the value of first generation rights like dignity and equality is questionable.

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<sup>47</sup> Haysom “Constitutionalism, Majoritarianism Democracy and Socio-economic Rights” 452. Haysom also argues for a minimum core of rights to be provided for all citizens. Haysom “Constitutionalism, Majoritarianism Democracy and Socio-economic Rights” 461. However, as will be seen later in this dissertation, a minimum core approach has not found favour with our courts.

<sup>48</sup> Haysom “Constitutionalism, Majoritarianism Democracy and Socio-economic Rights” 452. In making this statement Haysom makes a telling comment that the people of a country and not its judiciary are the real guardians of its constitution. *Ibid.*

<sup>49</sup> Haysom “Constitutionalism, Majoritarianism Democracy and Socio-economic Rights” 460 to 461.

Taking this point even further, it is submitted that in the absence of such essential socio-economic rights, the aforementioned first generation rights cannot be said to exist at all. The next Chapter looks in much more detail at the submitted interconnectedness of a whole series of constitutional rights with the right to food.

It is submitted that the justiciability of socio-economic rights (which were not fundamentally protected rights before the 1996 Constitution) is a move towards the espoused transformative aims of the Constitution as contained in its Preamble.<sup>50</sup> In interpreting both the Interim and Final Constitutions our courts have frequently interpreted the Constitution as an attempt to redress the gross injustices of the past.<sup>51</sup>

The need for real and effective enforcement of socio-economic rights in South Africa, and not merely ineffective rights on paper, has been raised on a number of occasions. Nthai highlights the need to deal properly with poverty, need, deprivation and inequality. Nthai argues that the provision of first generation rights, like the right to vote, without core socio-economic rights, like food, is to use first generation rights as a “smoke-screen” to hide the underlying forces which deprive people of their humanity.<sup>52</sup> Olivier *et al* argue that it is counter-productive to try to achieve adequate social security for all in isolation from other types of Constitutional rights.<sup>53</sup> Khoza adds to this by submitting that for those facing poverty, hunger and malnutrition, socio-economic rights remain a pipedream and simply aspirations.<sup>54</sup> The need for effective provision of socio-economic rights, including food, rather than notional rights without any real substance, is a key thread running through the fabric of this research.

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<sup>50</sup> The transformative aims of the Constitution are reflected in the following parts of its Preamble:

“We therefore, ... adopt this Constitution... so as to-

Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;

Improve the quality of life of all citizens and free the potential of each person; ...”

<sup>51</sup> For example, Mahomed held in *S v Makwanyane* 1995 (3) SA 391 (CC) that:

“The South African Constitution ... retains from the past only what is defensible and represents a break from ... the past”.

<sup>52</sup> Nthai “Implementation of Socio-economic Rights in South Africa.” 41.

<sup>53</sup> Olivier; Smit and Kalula *Social Security: A Legal Analysis* v.

<sup>54</sup> Khoza “Realising the Right to Food in South Africa: Not by Policy Alone- A Need for Framework Legislation” 664.

## 2.3 LIMITATION OF RIGHTS

Notwithstanding the justiciability of socio-economic rights in the Constitution, these rights are not unlimited. There are in-built limitations within certain sections of the Bill of Rights, as well as the general limitations clause in section 36 to consider. The internal limitations indicate that there is merely a right of access to these rights and that they are subject to progressive realisation within available resources.<sup>55</sup> Engh argues that the issue of available resources requires an assessment of financial, human and physical resources available to the state.<sup>56</sup> In terms of financial resource limitations, Olivier *et al* argue that a major problem with the South African social security system is that South Africa has a large population with a relatively small tax base, which results in limited tax income having to support many people.<sup>57</sup>

Section 36(1) provides that:

“The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.”

All rights in the Bill of Rights are subject to the general limitations in section 36. Applicable rights limitations in the Constitution are delineated in section 7(3) as read with section 36(2).<sup>58</sup> The internal limitations together with the general limitations clause lessen, to an extent, the obligations on the state in terms of the given rights. It is submitted that the extra limitations applicable to socio-economic rights recognise the substantial challenges facing the

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<sup>55</sup> These internal limitations are found in ss 26(2), relating to housing, and s 27 (2) relating to health care, food, water and social security.

<sup>56</sup> Engh “Developing Capacity to Realise Socio-Economic Rights. The Example of HIV/Aids and the Right to Food in South Africa” 5.

<sup>57</sup> Olivier; Okpaluba; Smit and Thompson (eds) *Social Security Law - General Principles* 122.

<sup>58</sup> S 7(3) says:

“The rights in the Bill of Rights are subject to limitations contained or referred to in section 36, or elsewhere in the Bill.”

S 36 (2) states:

“Except as provided for in subsection (1) or in any other provisions of the Constitution, no law may limit any right entrenched in the Bill of Rights.”

state in providing for such rights. The constitutional provisions applicable to the right to food, including the applicable limitations, will be analysed in the next Chapter.

Now that the applicable limitations of socio-economic rights have been delineated, it is necessary to outline how these limitations operate as a whole. Our courts<sup>59</sup> have adopted a two-stage approach to constitutional adjudication.<sup>60</sup> Firstly, the applicant bears the initial onus of proving that an infringement of a fundamental right has occurred due to law or conduct of the respondent. Once the applicant has successfully completed the first stage, the onus moves onto the respondent (which is normally the state) to endeavour to justify the infringement by way of section 36.<sup>61</sup> However, where a right is further limited by an internal limitation (as is the case in subsections 2 of both sections 26 and 27, relating to various types of socio-economic rights), an intermediary step is required after the completion of the first step before the second step is called for. In terms of these internal limitations the state must prove that it has made every attempt to meet these rights within the limits of its resources.

## **2.4 THE AMBIT OF STATE RESPONSIBILITY**

It is evident from the above discussion that socio-economic rights, subject to specific legitimate limitations, are enforceable. The next logical step is to discuss the extent of the state's duties in respect of rights contained in the Bill of Rights.

Section 7(2) of the Constitution indicates the state's obligations pertaining to all rights in the Bill of Rights. Section 7(2) requires the state to respect, protect, promote and fulfil these rights. Each part of the state's section 7(2) duties will now be discussed. This discussion will be based primarily on the South African Human Rights Commission's (SAHRC) interpretation of these obligations.<sup>62</sup> This brief analysis will focus on generic socio-economic obligations of the state in terms of section 7(2). The next Chapter will focus specifically on the state's obligations *vis- a-vis* the right to food.

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<sup>59</sup> For example, *Harksen v Lane NO* 1998 (1) SA 300 (CC).

<sup>60</sup> There is also much academic authority for this two-stage approach. See, for example, Currie & De Waal *The Bill of Rights Handbook* (2005) 5<sup>th</sup> ed 165 to 168.

<sup>61</sup> Pieterse "Towards a Useful Role for Section 36 of the Constitution in Social Rights Cases? *Residents of Bon Vista Mansions v Southern Metropolitan Local Council*" (2003) Vol 120 Part 1 *SALJ* 42.

<sup>62</sup> The South African Human Rights Commission *The Right to Food* Fifth Economic and Social Rights Report Series, 2002/2003 (2004) 1 to 6. See also the SAHRC (2003) 5<sup>th</sup> Economic and Social Rights Protocols. Accessed at [www.sahrc.org.za/protocols](http://www.sahrc.org.za/protocols) on 10 February 2006.

The state's duty to *respect* a right is a negative duty.<sup>63</sup> What is meant by a negative duty is that the state is obliged to prevent the denial of the right in question. The state would not be respecting the right to water, for example, if it cut off water supply to a household. A positive duty, on the other hand, requires active state intervention.

*Protection*, although essentially also imposing negative duties, requires limited positive steps in that the state must prevent individuals or organisations from denying the rights of others.<sup>64</sup> For example, the state must protect individuals from being unlawfully evicted.

It could be argued that in the pre-constitutional era there was no clear obligation on the state to do anything more than respect and protect socio-economic rights. However, the shift in South Africa towards clear justiciability of socio-economic rights, together with the additional directives in section 7(2) of the Constitution to promote and fulfil all rights in the Bill of Rights, means that socio-economic rights now require far more than mere respect and protection for the rights to be realised.

The SAHRC has indicated that the *promotion* of a right includes widespread education of what the right entails.<sup>65</sup> There is a clear need for education on the ambit of all rights, because there can be no meaningful enjoyment of any rights without knowledge of their existence and understanding of their implementation. In addition, the Commission calls for state monitoring of the effectiveness of the state's ability to progressively realise the right.<sup>66</sup> This last point will be taken much further later in this research, when repeated calls will be made for the conversion of theoretical rights into actual service delivery.

*Fulfilling* a right requires active government programmes and initiatives to ensure provision of rights. In its 4<sup>th</sup> Economic and Social Rights Report, the SAHRC indicates that the state

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<sup>63</sup> The South African Human Rights Commission *The Right to Food* Fifth Economic and Social Rights Report Series, 2002/2003 (2004) 6.

<sup>64</sup> *Ibid.*

<sup>65</sup> The South African Human Rights Commission *The Right to Food* Fifth Economic and Social Rights Report Series, 2002/2003 (2004) 2 and 6.

<sup>66</sup> *Ibid.*



must urgently step in to fill the need in desperate situations.<sup>67</sup> The words of Yacoob J in the *Grootboom* case support this view by saying:

“The state is obliged to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing.”<sup>68</sup>

The *Treatment Action Campaign* case mirrors this idea by holding that the state must take sound steps progressively to eradicate or lessen the widespread severe lack of resources which is an everyday reality for many people in South Africa.<sup>69</sup> Vulnerable groups like children, those with disabilities and the elderly are likely to be in most need of active state assistance in such emergency situations.

The fulfilment of socio-economic rights is subject to the internal limitations on such rights, discussed above. However, notwithstanding the caveats of progressive realisation and resource limitations, Liebenberg argues that this does not limit the state’s obligations.<sup>70</sup> This is understood to mean that the state must fulfil constitutionally protected socio-economic rights, but the extent to which it is able to do so may be limited by resource constraints. The state has the onus of proving that it has made every attempt realise these rights within the resources it has available. Liebenberg argues further that a country’s available resources should be understood as its “real resources” and not the budgetary allocations of government.<sup>71</sup> Liebenberg’s conception of available resources as real resources is a sensible one, as it prevents states from avoiding their constitutional duties under the guise of a lack of resources when in fact their budgetary allocation may be totally unreasonable.

From the aforementioned discussion of state responsibility in respect of socio-economic rights, it would appear that Engh is correct to argue that South Africa’s highly progressive Constitution is a positive indicator of its capacity to realise social and economic rights.<sup>72</sup>

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<sup>67</sup> The South African Human Rights Commission, *The Right to have Access to Sufficient Food*, in 4<sup>th</sup> Economic and Social Rights Report 2001/2002 (2003) 7.

<sup>68</sup> *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC) [Paragraph 24]. The link between this dictum and the right to food will be considered later in this research.

<sup>69</sup> *Minister of Health v Treatment Action Campaign* 2002 (10) BCLR 1033 (CC) [para 99]. The link between this dictum and the right to food will be considered later in this research.

<sup>70</sup> Liebenberg “The International Covenant on Economic, Social and Cultural Rights and its Implications for South Africa” (1995) 11 *SAJHR* 366.

<sup>71</sup> *Ibid.*

<sup>72</sup> Engh “Developing Capacity to Realise Socio-Economic Rights. The Example of HIV/Aids and the Right to Food in South Africa” 3.

## 2.5 CONSTITUTIONAL JURISDICTION

Section 172 of the Constitution indicates the powers of courts with constitutional jurisdiction.<sup>73</sup> This section should be read together with sections 167, 168 and 169 of the Constitution which give the jurisdiction of the Constitutional Court (CC), Supreme Court of Appeal (SCA) and High Courts respectively, and the rules of each of these courts.

The Constitutional Court has concurrent jurisdiction with the High Courts and the Supreme Court of Appeal in most constitutional matters.<sup>74</sup> However, in terms of section 172(2)(a), an order of constitutional invalidity by the SCA or High Court must be confirmed by the CC.

In the ordinary course of events, a constitutional challenge will first be brought to the High Court with jurisdiction over the matter. However, rule 18 of the Constitutional Court Rules<sup>75</sup> and section 167(6)(a) of the Constitution allow applicants to seek relief directly from the Constitutional Court in restricted circumstances. Currie and De Waal point out that the Court's rules allow for direct access to the CC in the interests of justice in matters where the court has concurrent jurisdiction and the case is sufficiently urgent or important to the public.<sup>76</sup>

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<sup>73</sup> S 172:

- (1) "When deciding a constitutional matter within its power, a court –
  - (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
  - (b) may make any order that is just and equitable, including –
    - (i) an order limiting the retrospective effect of the declaration of invalidity; and
    - (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."
- (2)
  - (a) The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.
  - (b) A court which makes an order of constitutional invalidity may grant a temporary interdict or other temporary relief to a party, or may adjourn the proceedings, pending a decision of the Constitutional Court on the validity of that Act or conduct.
  - (c) National legislation must provide for referral of an order of constitutional invalidity to the Constitutional Court.
  - (d) Any person or organ of state with a sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an order of constitutional invalidity by a court in terms of this subsection."

<sup>74</sup> Hopkins and Franca "In Which Forum to Litigate?" (September 2004) *De Rebus* 31.

<sup>75</sup> GN R1675, published in *Government Gazette* 25726/21-10-2002.

<sup>76</sup> Currie & De Waal *The Bill of Rights Handbook* 132.

In terms of section 172(1), there are basically two categories of constitutional orders which any of the three courts can make. Firstly, any unconstitutional law or conduct may be declared invalid in so far as the unconstitutionality goes.<sup>77</sup> This duty to strike down offending legislation and to allow the legislature to amend or repeal the law in question has been held to be the primary duty of courts with constitutional jurisdiction.<sup>78</sup> In making such invalidity orders it is clear that the court in question is performing a judicial rather than political function.<sup>79</sup> Plasket astutely comments that the constitutional provisions providing for constitutional supremacy depend on the independence and impartiality of the courts required by section 165.<sup>80</sup> This extensive power of judicial review is essentially what distinguishes our current system of constitutional supremacy from the prior system of parliamentary supremacy.<sup>81</sup>

An example of the use of the first-mentioned category of power is the Constitutional Court's declaration of certain parts of the Criminal Procedure Act 55 of 1977 unconstitutional in denying various constitutional rights, including the right to life, in *S v Makwanyane*.<sup>82</sup> A declaration of unconstitutional invalidity is easy to understand and does not warrant further discussion.

Secondly, there is a broad power for a court with constitutional jurisdiction to make any order that is just and fair or equitable.<sup>83</sup> It is not surprising that the very broad and unspecific power to make just and equitable orders has been harder for our courts to interpret. Section 38 of the Constitution, which allows courts to grant "appropriate relief" for a threat to or actual infringement of a fundamental right, is equally lacking in clarity. Justice Ackermann in *Fose v Minister of Safety and Security*, elucidates this judicial power as follows:

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<sup>77</sup> This is directly stated in s. 172(1)(a). In addition, this constitutional power of these superior courts is implied by the supremacy of the constitution provided for in ss 1(c), 2, 7(2) and 8(1). Plasket "Enforcing Judgments Against the State" (2003) *Speculum Juris* 4.

<sup>78</sup> *Kauesa v Minister of Home Affairs* 1996 (4) SA 965 (Nm SC) at 974 D to F.

<sup>79</sup> *S v Lawrence*; *S v Negal*; *S v Solberg* 1997 (10) BCLR 1348 (CC).

<sup>80</sup> Plasket "Enforcing Judgments Against the State" 4.

<sup>81</sup> For more on this fundamental change to our legal system see Plasket "Enforcing Judgments Against the State" 3 to 4.

<sup>82</sup> *S v Makwanyane* 1995 (3) SA 391 (CC). Section 277 of the Criminal Procedure Act, which authorised the death penalty for certain offences, was held to be unconstitutional.

<sup>83</sup> S 172(1)(b) of the Constitution.

“Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced.”<sup>84</sup>

However, despite this finding in *Fose* and the whole line of Constitutional Court decisions recognising the clear justiciability of socio-economic rights, there remains a lack of effective judgments to give real meaning to the concept of “appropriate relief”.<sup>85</sup> Trengrove submits that appropriate relief within the context of socio-economic rights would include an order directing the legislature and executive to bring about modification defined in terms of their aims and then to retain a supervisory jurisdiction to supervise the implementation of those changes.<sup>86</sup> The final Chapter of this dissertation will consider these and other proposed judicial remedies.

Whilst the courts need to come up with effective remedies to effectively realise socio-economic rights, the danger of ignoring the separation of powers doctrine remains ever present. In warning against the blurring of the separation of powers, it was held in *Minister of Health and Others v Treatment Action Campaign and Others (1)* that:

“Courts are ill-suited to adjudicate upon issues where court orders could have multiple social and economic consequences for the community. The Constitution contemplates rather a restrained and focused role for the courts, namely, to require the state to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation. Such determinations of reasonableness may in fact have budgetary implications, but are not in themselves directed at rearranging budgets. In this way the judicial, legislative and executive functions achieve appropriate constitutional balance.”<sup>87</sup>

Pieterse could be said to be impliedly critical of this part of the *TAC* judgment, when he argues for more creative court remedies concerning the enforcement of socio-economic rights. He argues that the Constitution requires a reconception of the separation of powers doctrine wherein the judiciary must play a more pro-active role and that it is possible to

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<sup>84</sup> 1997 (3) SA 786 (CC).

<sup>85</sup> Currie and De Waal *The New Constitutional and Administrative Law: Constitutional Law* (2001) Vol 1 399. Earlier in this Chapter it was indicated that *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*, 1996 1996 (4) SA 744, *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC) and *Minister of Health v Treatment Action Campaign* 2002 (5) SA 703 (CC) and 2002 (5) SA 721 (CC) are all authority for the justiciability of socio-economic rights.

<sup>86</sup> Trengrove “Judicial Remedies for Violations of Socio-economic Rights” (1999) 1 (4) *ESR Review* 8 at 9.

<sup>87</sup> 2002 (10) BCLR 1033 (CC) Para. 38.

maintain a balance between judicial vigilance and deference in socio-economic rights adjudication.<sup>88</sup> This submission of Pieterse is in accordance with Scott and Alston's argument that the adjudication of constitutional rights involves a choice as to the extent and type of the involvement of a court.<sup>89</sup> More creative judicial remedies are also called for by Beutz<sup>90</sup> who argues that to legitimise the use of state power in a democracy, constitutionalism must not only distinguish the extent of state power, but also create ways of ensuring that those who exercise the power are held accountable.<sup>91</sup> All the submissions cited in this paragraph are calling for a greater and more creative role of our courts to better realise socio-economic rights. In later Chapters of this dissertation, arguments will be made for such robust adjudication of the right to food.

## 2.6 *LOCUS STANDI* AND ACCESS TO COURT

In terms of section 34 of the Constitution, everyone has the right of access to court. In *Chief Lesapo v North West Agricultural Bank* Justice Mokgoro described access to justice as:

“foundational to the stability of an orderly society. It ensures the peaceful, regulated and institutionalized mechanisms to resolve disputes, without resorting to self-help. The right of access to court is a bulwark against vigilantism, and the chaos and anarchy which it causes”.<sup>92</sup>

Applying section 34 to socio-economic rights, it is clear that litigants have the right to approach the appropriate court to enforce a socio-economic right which has been allegedly breached.<sup>93</sup>

It is submitted that access to court is intrinsically linked with *locus standi*, the power to bring a matter to court. Limitations as to who has *locus standi* to bring an action for an alleged breach of a constitutional right could serve as an indirect limitation of such a right. However,

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<sup>88</sup> Pieterse “Coming to Terms With Judicial Enforcement of Socio-economic Rights” 383.

<sup>89</sup> Scott & Alston “Adjudicating Constitutional Priorities in a Transnational Context: A Comment on *Soobramoney's* Legacy and *Grootboom's* Promise” (2000) Vol 16 Part 2 *SAJHR* 216.

<sup>90</sup> Beutz “Functional Democracy: Responding to Failures of Accountability” (2003) 44 *Harvard International Law Journal* 387. Cited in Pieterse “Coming to Terms With Judicial Enforcement of Socio-economic Rights” 385.

<sup>91</sup> Beutz's call for greater state accountability also has the potential to be improved by the workings of the South African Human Rights Commission, which is discussed in Chapter 6.

<sup>92</sup> 2000 (1) SA 409 (CC) para 22.

<sup>93</sup> The constitutional jurisdiction of various South African courts will be discussed in a later Chapter.

it is submitted that section 38 of the Constitution casts the *locus standi* net very wide as to who may bring a matter to court.

In terms of section 38 persons who may approach a court alleging an infringement of a right in the Bill of Rights are the following:

- “(a) anyone acting in their own interest;
- (b) anyone acting on behalf of another person who cannot act in their own name;
- (c) anyone acting as a member of, or in the interest of, a group or class of persons;
- (d) anyone acting in the public interest; and
- (e) an association acting in the interest of its members.”

Scott and Alston argue that the broad *locus standi* provisions of section 38 accord with the interrelatedness of all types of human rights.<sup>94</sup> The inclusion of a wide *locus standi* provision makes a great deal of sense as it would be pointless to provide rights without allowing all affected parties to protect those rights. It is therefore submitted that this wide *locus standi* provision is a significant tool for the enforcement of socio-economic rights. As illustrated by leading socio-economic rights cases to be discussed in Chapter 6 of this dissertation, class actions and public interest litigation, for example, are key tools for the meaningful justiciability of these rights. Furthermore, as will also become apparent from those case discussions, enforcement of judgments is an equally essential part of access to courts and a just society. It has been held that access to court would be an illusion without adequate enforcement of judgments.<sup>95</sup>

An aspect of socio-economic rights enforceability which can still be discussed a great deal further is the aforementioned possible blurring of the doctrine of separation of powers through socio-economic rights justiciability. When courts in enforcing socio-economic rights essentially step into the shoes of what should ordinarily be a function of the executive (through judgments which have the effect of deciding how state money should be spent) it can be argued that the courts have overstepped their allocated powers. The criticism of such judicial involvement is that judges, unlike the legislative and indirectly the executive, are appointed not elected. In addition to judges not being elected, it has correctly been said that

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<sup>94</sup> Scott & Alston “Adjudicating Constitutional Priorities in a Transnational Context: A Comment on *Soobramoney’s* Legacy and *Grootboom’s* Promise” 214. This issue of interrelated rights will be elaborated upon in the next Chapter.

<sup>95</sup> *Mjeni v Minister of Health and Welfare, Eastern Cape* 2000 (4) SA 446 (Tk) 453C.

they are not best qualified to make such policy-making decisions.<sup>96</sup> Fabre argues that such a situation, where unelected judges make policy decisions, can severely erode democracy.<sup>97</sup> However, quite to the contrary, in the course of this research it will be argued that whilst courts need to take cognizance of their designated judicial role, the enforcement of socio-economic rights by the courts is not only permissible but absolutely necessary to give real meaning to these rights in the Bill of Rights. Along the same lines as this submission, Pieterse argues that the Constitution requires a reconception of the separation of powers doctrine and the role of judiciary therein.<sup>98</sup> The Constitution in making socio-economic rights justiciable clearly moved the boundaries of the separation of powers doctrine. To give real meaning and effectiveness to socio-economic rights in the lives of people requires judicial enforcement of these rights, which implicitly requires the judiciary to make policy decisions to some degree.<sup>99</sup> The *Certification* judgment provides authority for our courts to sometimes move beyond their traditional confines in terms of the separation of powers doctrine to decide issues traditionally within the realm of other government branches.<sup>100</sup>

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<sup>96</sup> Fabre *Social Rights Under the Constitution: Government and the Decent Life* (2000) 2.

<sup>97</sup> Fabre *Social Rights under the Constitution: Government and the Decent Life* 146.

<sup>98</sup> Pieterse “Coming to Terms With Judicial Enforcement of Socio-economic Rights” 384. Pieterse submits that our courts must give meaning to socio-economic rights through their interpretation thereof, their evaluation of government compliance with their decisions, adjudicate the validity of government legislation and policy and remedy any state non-compliance.

<sup>99</sup> See the discussion later in this thesis of various cases where our superior courts have taken just such a proactive approach; perhaps the *locus classicus* in this regard is *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC).

<sup>100</sup> *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*, 1996 1996 (10) BCLR 1253 (CC) at para 78.

## **CHAPTER 3**

### **THE CONSTITUTIONAL RIGHT TO FOOD**

#### **3.1 INTRODUCTION TO THE CHAPTER**

The previous Chapter has shown that socio-economic rights are justiciable. This Chapter analyses what the constitutional right to food entails in South Africa. The right to food for particularly vulnerable groups, such as children, will also be considered. A brief analysis of the right to socio-economic rights in international law, focusing on the right to food, will also be made. As state provision of food and adequate nutrition is an administrative action, an analysis of the right to just administrative action will also be explored in a later Chapter. In this Chapter only brief reference will be made to court interpretations of the right to social and economic rights, as a detailed analysis of key judgments in the area will follow in Chapter 6.

#### **3.2 DIRECT PROVISIONS IN THE CONSTITUTION**

There are three direct references to food and nutrition in the Bill of Rights. Firstly, section 27(1)(b), the right to sufficient food, is listed as part of the state's socio-economic obligations. Secondly, section 28(1)(c), dealing with various rights of children, provides for basic nutrition for all children. Finally, dealing with the rights of people in prison, section 35(2)(e) guarantees them the right to adequate nutrition too.<sup>101</sup> The right to food in terms of sections 27 and 28 will be discussed in turn.

##### **3.2.1 SECTION 27(1)(B)- THE RIGHT TO SUFFICIENT FOOD**

The constitutional right to food is found in section 27 of the Constitution.<sup>102</sup> The relevant parts of section 27 declare:

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<sup>101</sup> It was indicated in the introductory Chapter that prisoners' right to nutrition falls beyond the scope of this dissertation.

<sup>102</sup> The SAHRC designed its 5<sup>th</sup> Sufficient Food Protocol based on s 27(1)(b). This was sent to the Department of Agriculture for their response. *The Right to Food* in The South African Human Rights Commission Fifth Economic and Social Rights Report Series, 2002/2003 (2004) Footnote 1.



- “27(1) Everyone has the right to have access to -
  - (b) sufficient food and water; ...
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of these rights.”

Sections 27(1)(b) and 27(2) read with section 7(2) of the Constitution clearly indicate that the state must ensure, within its available resources, that everyone has sufficient food.<sup>103</sup> Khoza correctly notes that the measures envisaged by section 27(2) include the development and implementation of policies and programmes, as well as enacting legislation.<sup>104</sup> The South African Human Rights Commission (SAHRC) put forward what it perceives to be the meanings of each aspect of the state’s duty in terms of section 27(1)(b) in light of the directives in section 7(2) to respect, protect, promote and fulfil rights.<sup>105</sup> In the previous Chapter the parameters of the state’s section 7(2) obligations in relation to generic socio-economic obligations in the Bill of Rights were explored. Each part of the state’s section 27(1)(b) duties will now be discussed.

The duty to *respect* the right to food is a negative duty whereby the state should not itself deny anyone access to food or limit equal access to the right to food.<sup>106</sup> The fair allocation of fishing quotas is an example of the state’s obligation to respect the right.<sup>107</sup> An example of a state not respecting the right to food through intentional state action to worsen existing access to food is the African Human Commission case of *Social and Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Rights v Nigeria*.<sup>108</sup> In this case the state was held duty-bound to not interfere with access to food. The case arose out of Nigerian military personnel destroying crops and livestock in certain villages as part of a political

<sup>103</sup> S 7(2) of the Constitution provides that:

“The state must respect, protect, promote and fulfil the rights in the Bill of Rights.”

<sup>104</sup> Khoza “Realising the Right to Food in South Africa: Not by Policy Alone- A Need for Framework Legislation” 665.

<sup>105</sup> The South African Human Rights Commission *The Right to Food* Fifth Economic and Social Rights Report Series, 2002/2003 (2004) 1 to 6. See also the SAHRC (2003) 5<sup>th</sup> Economic and Social Rights Protocols. [www.sahrc.org.za/protocols](http://www.sahrc.org.za/protocols) (accessed on 10 February 2006).

<sup>106</sup> By way of comparison, Currie and De Waal indicate that negative protection is the usual form of judicial protection given to civil and political rights, meaning that the courts can prevent the State denying these rights to those in the country. Currie & De Waal *The Bill of Rights Handbook* 567.

<sup>107</sup> The South African Human Rights Commission *The Right to Food* Fifth Economic and Social Rights Report Series, 2002/2003 (2004) 6. Brand notes that in apartheid South Africa the state failed to respect the right to food through effectively prohibiting subsistence fishing. Brand “The Right to Food” in Brand and Heyns (eds) *Socio-Economic Rights in South Africa* 168.

<sup>108</sup> Communication 155/96.

strategy to quash political opposition.<sup>109</sup> Kallman notes how the duty to respect the right to food was denied in apartheid South Africa through forced removals of people away from agriculturally productive land to land unsuitable for agriculture.<sup>110</sup> The state's duty to respect the right to food dovetails with the obligation on individuals to feed themselves, in so far as they are able, by buying or producing food from the land. Kallman notes that the duty to feed yourself and your family is a primary duty.<sup>111</sup> When considering the state's obligations in terms of the right to food, it is important to remember this primary duty of individuals. However, it is submitted that this duty on individuals is only applicable to those capable of feeding themselves and their dependants. Someone who is able to provide himself and his family with sufficient food will not be able to escape their own responsibility and shift this task onto the state. However, it is possible for the state to fail indirectly to respect the right to food through making it virtually impossible for people to produce adequate food- as in the above example of forced removals in apartheid South Africa.

Brand correctly notes that despite the duty to respect the right to food, it is possible for the right to be interfered with for the sake of a significant public purpose.<sup>112</sup> For example, a person's ability to produce crops is significantly eroded if they are evicted from the land they occupy. The state would have to show a clear link between the proposed eviction and the meeting of a considerable public purpose. Brand argues that in such a scenario the state is duty-bound to mitigate the impact of such interferences on the affected people, for example through the implementation of laws which require courts to consider the availability of alternative land before granting an eviction.<sup>113</sup>

*Mashava v The President of the Republic of South Africa* is authority for saying that the state fails to respect the right to food if through its own actions it effectively prevents people accessing food or improving their access thereto.<sup>114</sup> In this case the Constitutional Court decided that a proclamation by the State President that social grants would be administered at

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<sup>109</sup> *Supra.*

<sup>110</sup> Kallman *Knowing and Claiming Your Right to Food* (December 2004) 6.

<sup>111</sup> Kallman *Knowing and Claiming Your Right to Food* 5.

<sup>112</sup> Brand "The Right to Food" in Brand and Heyns (eds) *Socio-Economic Rights in South Africa* 168.

<sup>113</sup> Brand "The Right to Food" in Brand and Heyns (eds) *Socio-Economic Rights in South Africa* 169. This issue will be revisited in Chap 7 when suggestions are made as to how to uphold the right to food through land reform in terms of ESTA and PIE.

<sup>114</sup> 2004 (12) BCLR 1243 (CC).

a provincial level was unconstitutional in failing to respect the right to food.<sup>115</sup> Albeit an *obiter* finding (as the decision was reached on a technical basis related to powers granted under the Interim Constitution), Brand notes that the *Mashava* decision requires the state to respect the right to food by removing obstacles to the right being properly met, for example through the removal of administrative inefficiency.<sup>116</sup> The link between the need for just administrative action as a means of achieving the right to food will be explored in more detail in the next Chapter.

*Protection*, although basically also imposing negative duties, requires some positive steps in that the state must prevent individuals or organisations from denying the food rights of others. For example, the state would be failing to protect the right to food if it allowed a business to pollute a river which was the only source of water for an individual or community to produce crops.<sup>117</sup>

The UN Special Rapporteur on the Right to Food correctly notes that section 8(2) of the South African Constitution<sup>118</sup> ensures that the Bill of Rights applies horizontally:

“which means that a transnational corporation (or domestic business) could be held liable for violation of the right to food”.<sup>119</sup>

The right to food obligations on the private sector apply largely to food manufacturers and traders who must not collude or engage in unfair business practices which cause unfairly high prices.<sup>120</sup> Private manufacturers in South Africa have also fairly recently been forced to fortify certain basic types of foods.<sup>121</sup> Brand argues that protection of the right to food requires effective state regulation of the food market to guarantee that basic food

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<sup>115</sup> Mashava, who qualified for a disability grant, had an unacceptably long delay in having his grant application processed by the Limpopo Provincial government. *Supra*. Para 9.

<sup>116</sup> Brand “The Right to Food” in Brand and Heyns (eds) *Socio-Economic Rights in South Africa* 169.

<sup>117</sup> Kallman *Knowing and Claiming Your Right to Food* 6.

<sup>118</sup> S 8 (2) says:

“A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of the duty imposed by the right.”

<sup>119</sup> UN General Assembly, Special Rapporteur on the Right to Food, 5 August 2003, para 39. Cited in *The Right to Food*. South African Human Rights Commission. Fifth Economic and Social Rights Report Series, 2002/2003 (2004) Footnote 4.

<sup>120</sup> Kallman *Knowing and Claiming Your Right to Food* 7 - 8.

<sup>121</sup> Brand “The Right to Food” in Brand and Heyns (eds) *Socio-Economic Rights in South Africa* 171.

commodities are affordable for the poor.<sup>122</sup> It is submitted that price fixing of food products which amounts to uncompetitive practice would be the sort of unacceptable behaviour that the state is duty-bound to prevent. The private sector is also duty-bound not to produce dangerous food-stuffs.<sup>123</sup> There is an obvious link between the negative duties placed on non-state entities in relation to the right to food, and the state's obligations to ensure that the private sector complies with these duties. The state must therefore counter fraud, unethical trade behaviour and contractual relations and stop dangerous food entering the market.<sup>124</sup>

The state must also protect against localised violations of the right to food, such as the actions of farmers who deny workers and tenants on their farms rightful access to grazing and land for crops, or deny food and water as a way of strategically evicting such people.<sup>125</sup> Such behaviour by farmers can cause a sequence of negative social consequences for the affected workers or tenants and hence demands urgent state protection. For example, farm workers who leave farms under such circumstances could, as a result, face a lack of housing and other service provision. In Chapter 7, where concluding comments and suggestions are made, the interpretation of existing land tenure legislation, in particular the Prevention of Illegal Eviction and Unlawful Occupation of Land Act and the Extension of Security of Tenure Act, will be considered as a way to protect the right to food.

The SAHRC has indicated that the state's duty to *promote* the right to food includes widespread education on the ambit of the right to food.<sup>126</sup> The Commission also calls for state monitoring of whether the state is progressively realising the right to food.<sup>127</sup> It is submitted that, while monitoring of progressive realisation of the right to food is both advisable and necessary, such monitoring should be done by a qualified non-state organisation. The rationale for this proposal is quite simply that an outside body is far more

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<sup>122</sup> Brand *The Rights to Food and Nutrition in the South African Constitution* (July 2000). Quoted in The South African Human Rights Commission *The Right to Food* Fifth Economic and Social Rights Report Series, 2002/2003 (2004) 2.

<sup>123</sup> Kallman *Knowing and Claiming Your Right to Food* 8.

<sup>124</sup> The South African Human Rights Commission *The Right to Food* Fifth Economic and Social Rights Report Series, 2002/2003 (2004) 6.

<sup>125</sup> South African Human Rights Commission, *Final Report on the Inquiry into Human Rights Violations in Farming Communities*, August 2003. Cited in The South African Human Rights Commission *The Right to Food* Fifth Economic and Social Rights Report Series, 2002/2003 (2004) 7.

<sup>126</sup> The South African Human Rights Commission *The Right to Food* Fifth Economic and Social Rights Report Series, 2002/2003 (2004) 7.

<sup>127</sup> *Ibid.*

likely to provide an impartial assessment of state performance than the state assessing itself. In addition, such non-state assessment would be more credible in terms of the appearance of impartiality.

*Fulfilling* the right to food requires active government feeding programmes and initiatives to ensure that peoples' nutritional needs are met. The SAHRC's 4<sup>th</sup> Economic and Social Rights Report says that urgent state intervention is required in severe situations.<sup>128</sup> It is submitted that, in relation to food crises, times of drought, flooding, famine and other natural or man-made disasters which limit the availability of adequate food are the types of emergencies where urgent state assistance is called for. Kallman argues that the state's duty to fulfil the right to food includes the creation of agricultural support programmes to ensure that people who are able to feed themselves can carry on doing so. He further submits that proper agricultural production and trade policies are required to ensure the continued availability of food.<sup>129</sup> On the basis of international law authority, Brand indicates that fulfilment of the right to food requires the state to come up with multi-faceted measures (including legislation, administrative and judicial responses) to ensure that any current denial of access to food can be remedied and shortcomings lessened.<sup>130</sup>

The ambit of what the state is required to do in relation to the fulfilment of socio-economic rights has been judicially considered in relation to access to adequate housing, health care and social assistance.<sup>131</sup> The *ratio decidendi* of each of these decisions will be applied to the right to food in Chapter 6 of this dissertation to indicate the ambit of the state's likely fulfilment obligations in relation to the right to food.

It will be submitted that state assistance in times of food shortages could take the form of feeding schemes or adequate social assistance grants which would allow the affected parties to buy food.<sup>132</sup> In relation to both these mechanisms, in terms of the Constitution, the state

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<sup>128</sup> The South African Human Rights Commission, *The Right to have Access to Sufficient Food*, in 4<sup>th</sup> Economic and Social Rights Report 2001/2002 (2003) 7.

<sup>129</sup> Kallman *Knowing and Claiming Your Right to Food* 7.

<sup>130</sup> Brand "The Right to Food" in Brand and Heyns (eds) *Socio-Economic Rights in South Africa* 178: Citing Committee on ESCR- *General Comment No 14*.

<sup>131</sup> The judgments in question are *Soobramoney*, *Grootboom*, *TAC* and *Khosa*.

<sup>132</sup> Chapter 5 will discuss the current South African implementation programmes in place to meet the right to food and nutrition.

must progressively realise the right to food and social security (which in this context would take the form of social assistance):

“within its available resources.”<sup>133</sup>

The state must prove that it has made every attempt to meet these rights within the limits of its resources. Liebenberg’s submission that a country’s available resources should be understood as its “real resources” and not the budgetary allocations of government, has already been noted in the previous Chapter.<sup>134</sup> It was also argued in the last Chapter that this interpretation of available resources as real resources is correct, as a narrow interpretation would unacceptably allow the state to avoid its constitutional obligations without adequate cause.

Mubangizi correctly argues that sufficiency and accessibility are the two core components of the right to food.<sup>135</sup> In relation to sufficiency, the food must be culturally sensitive, nutritionally sufficient in terms of quantity and quality and safe for consumption.<sup>136</sup> Examples of culturally sensitive food are Kosher food for Jewish people and Halaal food for Islamic people: the provision of food not meeting these requirements for these groups cannot be considered to meet their needs. Food of a nutritiously adequate quality and quantity will clearly meet the nutritional requirements of a person to operate at their optimum physically and mentally. Practical examples of unsafe food are food-stuffs containing poisons and food that has become rotten because of a lack of refrigeration.<sup>137</sup>

In relation to accessibility, once all the sufficiency requirements have been met, that food must be both available and affordable.<sup>138</sup> Kallman argues that there is a requirement of physical accessibility to food; which means that food must at all times be within reach of people.<sup>139</sup> For example, there is no physical accessibility if a food source cannot be accessed by people due to a lack of transport to get to the food source. Mubangizi’s research indicates

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<sup>133</sup> S 27(2)(b) of the Constitution.

<sup>134</sup> Liebenberg “The International Covenant on Economic, Social and Cultural Rights and its Implications for South Africa” 366.

<sup>135</sup> Mubangizi *The Protection of Human Rights in South Africa: A Legal and Practical Guide* (2004) 137.

<sup>136</sup> Cheadle *et al South African Constitutional Law: The Bill of Rights* 499.

<sup>137</sup> Kallman *Knowing and Claiming Your Right to Food* 4.

<sup>138</sup> Mubangizi *The Protection of Human Rights in South Africa: A Legal and Practical Guide* 137.

<sup>139</sup> Kallman *Knowing and Claiming Your Right to Food* 5.

that there is sufficient food of a satisfactory quality in South Africa to adequately feed all living here, but unaffordability means that the right to food is denied to many. Mubangizi therefore argues for state price regulation to ensure affordability.<sup>140</sup> Vidar puts forward a contrasting view that there are numerous instruments in place to ensure the realisation of the right to food without interfering in the free market, market liberalisation and principles of efficiency.<sup>141</sup>

It is worth noting that there was no equivalent right to adequate food for people over 18 under the Interim Constitution.<sup>142</sup> The reason for pointing out the change in the final Constitution is to highlight the legislature's clear realisation of the importance of ensuring that all people in South Africa have access to their basic food requirements.

On the basis of this discussion of section 27(1)(b), it would appear as if the right to food is realised when everyone has physical or economic access to sufficient food at all times.<sup>143</sup> Other aspects of the right to food will be considered in Chapter 6 when key constitutional judgments on other socio-economic rights will be considered. The rationale of these decisions has a clear bearing on how the right to food should be interpreted.

### 3.2.2 SECTION 28(1)(C)- CHILDREN'S RIGHTS TO BASIC NUTRITION

Section 28(1)(c) of the Constitution says that:

“Every child has the right-  
to *basic nutrition*, shelter, basic health care services and *social services*,” (own emphasis added).<sup>144</sup>

Virtually all aspects of the right to food in section 27(1)(b), as discussed above, apply *mutatis mutandis* to children's nutritional rights. But the existence of special protection for children in section 28(1)(c) also requires analysis.<sup>145</sup> In other words, children have all the right to food

<sup>140</sup> Mubangizi *The Protection of Human Rights in South Africa: A Legal and Practical Guide* 137.

<sup>141</sup> However, Vidar fails to elaborate what instruments he has in mind. Vidar “Towards Voluntary Guidelines on the Right to Food” *ESR Review* Vol 5 No 1 (2004) 14.

<sup>142</sup> Cockrell “The Law of Persons and the Bill of Rights” in *Bill of Rights Compendium* (1999) 3E-15.

<sup>143</sup> Kallman *Knowing and Claiming Your Right to Food* 4.

<sup>144</sup> Other parts of s 28(1) provide for other specific rights accorded to children.

<sup>145</sup> The South African Human Rights Commission's 5<sup>th</sup> Basic Nutrition Protocol, based on s 28 (1)(c), was sent to the National Department of Health and provincial Departments of Health. *The Right to Food* in

rights of adults plus additional measures applicable to them only. Kallman puts forward a sensible argument that the inability of children to feed themselves is what warrants the extra Constitutional protection for these vulnerable groups, over and above the general right to food in section 27.<sup>146</sup> The special social security protection provided to children in the Constitution is called for when one considers that research has shown that approximately two thirds of South African children continue to live in poverty.<sup>147</sup> I deal with the link between the right to food, social assistance and social grants later in this Chapter. In relation to these interconnected rights, it is sufficient to note at this point that the provision of adequate social security, such as social assistance grants, can allow for adequate feeding of children.

Cockrell notes that the duty imposed on the state by section 28(1), to provide for the needs of children, is controversial in so far as it is questionable whether the courts are best equipped to allocate scarce economic resources.<sup>148</sup> Parallel to the duty imposed by section 28(1) is the primary parental duty of care as contained in common law and reinforced by the Child Care Act.<sup>149</sup>

Cockrell notes two further aspects of section 28(1) which are worth considering.<sup>150</sup> Firstly, the use of the word “basic” in the section indicates that the state’s obligation would seem to provide for the needs of children in extreme situations. Secondly, whilst other constitutionally protected socio-economic rights applicable to all age groups provide for mere “access” to the listed rights, there is no such caveat to the rights of children in 28(1). It is possible that section 28(1) differs from other socio-economic rights provisions in the Constitution because a child’s vulnerability means that certain rights must be provided to him or her and that mere access thereto will not suffice. However, as will be seen from the case discussion of *Grootboom* later in this dissertation, this last point is contentious.<sup>151</sup>

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The South African Human Rights Commission Fifth Economic and Social Rights Report Series, 2002/2003 (2004) Footnote 1.

<sup>146</sup> Kallman *Knowing and Claiming Your Right to Food* 4.

<sup>147</sup> BIG Financing Group *Breaking the Poverty Trap: Financing a Basic Income Grant in South Africa* (2004) 6.

<sup>148</sup> Cockrell “The Law of Persons and the Bill of Rights” (1999) 3E-15. In *Constitutional Law of South Africa* (2004).

<sup>149</sup> In particular, s 50(2) of the Child Care Act 74 of 1983.

<sup>150</sup> Cockrell “The Law of Persons and the Bill of Rights” (1999) 3E-15.

<sup>151</sup> *Grootboom supra*.



In addition to section 28(1) requiring more than mere access to the given rights for children, there are also no internal limitations on these rights. This differs from the rights to housing in section 26 and various other socio-economic rights in section 27 which are resource dependent and subject to progressive realisation. It is submitted that the lack of any internal limitation to section 28 provides the state with an increased obligation to ensure that all children benefit from the listed rights, including food. As children are not required (and subject to very limited exceptions, should not be permitted) to work, they find themselves in a vulnerable position in relation to feeding themselves. This provides a likely justification for the lack of internal limitation to the rights of children (including the right to basic nutrition) in section 28. Brand argues that it will be harder for the state to justify not meeting children's nutritional needs (under section 28) than the right of everyone to food in section 27.<sup>152</sup> Unless somehow saved by the general limitations clause in section 36, and it is very hard to envisage a reasonable and justifiable law of general application legitimately limiting a child's right to basic nutrition, the state is bound to ensure immediately that all children in South Africa are receiving adequate nutrition.

### 3.3 RELATED CONSTITUTIONAL PROVISIONS

Govindjee correctly argues that various constitutional rights are intrinsically interconnected with one another.<sup>153</sup> In the last Chapter the link between the realisation of first generation and second generation rights was briefly discussed. It is submitted that the right to food clearly affects and is affected by other Constitutional rights.<sup>154</sup> Brand astutely comments that the right to food is in a way "embedded" in related rights.<sup>155</sup> The denial of an interrelated right may therefore result in a denial of the right to food and vice versa. Thus an examination of provisions in the Constitution which entrench the right to sufficient food must include both the direct provisions in sections 27 and 28 and these interconnected and supporting rights.

It is submitted that the main interconnected and supporting constitutional rights to the right to food are the rights to life, equality, dignity, property, social security (including social

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<sup>152</sup> Brand "The Right to Food" in Brand and Heyns (eds) *Socio-Economic Rights in South Africa* 163.

<sup>153</sup> Govindjee *The Constitutional Right to Social Assistance as a Framework for Social Policy in South Africa: Lessons from India* 2.

<sup>154</sup> Later in this Chapter in the discussion of international law the interconnectedness of the right to food with other rights will be stressed again.

<sup>155</sup> Brand "The Right to Food" in Brand and Heyns (eds) *Socio-Economic Rights in South Africa* 164.

assistance), water, health care and education.<sup>156</sup> Protection of each of these core rights assists in protecting other related rights. Each one of these rights will be briefly discussed in so far as they impact upon the right to sufficient food. The relevance of discussing connected rights is supported by Vidar's suggestion that access to food depends on land rights, the production of food, income security and proper education, whilst good nutrition is reliant upon access to good health care, sanitation and safe water.<sup>157</sup> Vidar also submits that enjoyment of the right to food depends on a number of factors and requires various institutions to be working properly. Food production, distribution, pricing and consumer knowledge all have a role to play: a weakness anywhere along the line may negatively affect one's right to food.<sup>158</sup> Khoza writes that the right to food is a precondition for the enjoyment of all other rights.<sup>159</sup> Violating the right to food amounts to the denial of various other rights.

The analysis of interconnected rights will begin with the rights to dignity, life and equality because these rights have been identified in the Constitution<sup>160</sup> itself and case law<sup>161</sup> as core constitutional rights. These rights reflect the key values of the Constitution and guide the judiciary's adjudication of all constitutional matters. It is therefore not surprising that strong arguments can be made that when people are denied access to adequate food they are denied their rights to dignity, life and equality. The judgments of *Grootboom*<sup>162</sup> and *Khosa*<sup>163</sup> recognise that a society built upon the principles of dignity, equality and freedom works towards ensuring that the basic necessities of life are provided to everyone. It is submitted that the provision of basic necessities must include adequate food, one of the most fundamental of human needs.

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<sup>156</sup> The relevant interconnected sections are found in the following sections of the Constitution: The right to dignity: s 10; life: s 11; equality: s 9; social security including social assistance: s 27 (1)(c) water: s 27(1)(b); health care: s 27(1)(a) and education: s 29.

<sup>157</sup> Vidar "Towards Voluntary Guidelines on the Right to Food" 13.

<sup>158</sup> *Ibid.*

<sup>159</sup> Khoza "Realising the Right to Food in South Africa: Not by Policy Alone- A Need for Framework Legislation" 666.

<sup>160</sup> S 7(1) of the Constitution lists dignity and equality (together with freedom) as cornerstone rights in the Bill of Rights.

<sup>161</sup> See the discussion later in this Chapter of the recognition in *S v Makwanyane* of life and dignity as the most important fundamental rights as well as the sources of all other rights in Chapter 2 of the Constitution. *S v Makwanyane* Para. 144. A similar sentiment is expressed in *Grootboom* para 44 and *Khosa* 2004 (6) BCLR 569 (CC) para 52.

<sup>162</sup> *Grootboom* para 44.

<sup>163</sup> *Khosa* para 52.

### 3.3.1 THE RIGHT TO DIGNITY

Arthur Chaskalson, then President of the Constitutional Court, described the right to dignity as a founding constitutional value which must enlighten all facets of our legal system.<sup>164</sup> Similarly, it was held in *Dawood and Another v Minister of Home Affairs and Others, Salabi and Another v Minister of Home Affairs and Others, Thomas and Another v Minister of Home Affairs and Others* that:

“dignity ... informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights.”<sup>165</sup>

The aforementioned interpretations of the ambit of the right to dignity highlight its intrinsic linkage with many, if not all, other rights. In the same *Dawood* judgment, Justice Chaskalson points out that socio-economic rights are rooted in a respect for human dignity because a lack of basic necessities like food, health care and others will invariably mean that a person deprived of such basic needs is denied a dignified existence.<sup>166</sup>

The interconnectedness of the right to dignity with the right to food is, it is submitted, clear. Someone who does not have adequate food to meet their basic human needs is being denied their right to dignity. For example, Kallman points out that someone without food is subject to the indignity of having to beg for food or to be dependent on others.<sup>167</sup> The Constitutional Court was quick to point out in the *Dawood* case that in terms of section 10 of the Constitution, human dignity is a valid, enforceable and justiciable *right* (own emphasis added) not simply an intangible value.<sup>168</sup> Cheadle indicates that the Constitution recognises the absolute need to secure nutritional welfare which is required for a dignified existence.<sup>169</sup>

It is thus submitted that the existence of the constitutional right to dignity provides indirect constitutional backing for the right to food.

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<sup>164</sup> Chaskalson “The Third Bram Fischer Lecture: Human Dignity as a Foundational Value of our Constitutional Order” (2000) 16 *SAJHR* 193 195.

<sup>165</sup> *Dawood and Another v Minister of Home Affairs and Others, Salabi and Another v Minister of Home Affairs and Others, Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) para 35.

<sup>166</sup> *Supra*.

<sup>167</sup> Kallman *Knowing and Claiming Your Right to Food* 2.

<sup>168</sup> *Supra*.

<sup>169</sup> Cheadle *et al South African Constitutional Law: The Bill of Rights* 498.

### 3.3.2 THE RIGHT TO LIFE

The link between the right to life and the right to food is less documented jurisprudentially. However, Dobbert finds the link self-evident when he asserts that:

“To claim the right to food as a natural right, inseparably connected with the right to life, seems self-evident. And since physical survival of man has at all times been dependent on food, one would assume that this right should have been recognised as soon as man began to indulge in the luxury of philosophical thought and reflections on law.”<sup>170</sup>

Life should be interpreted more broadly than simply living to include a reasonable quality of life. For those suffering under the yoke of severe poverty, the lack of sufficient food results in their not having a reasonable quality of life. Justice O'Regan in *S v Makwanyane* recognised that the right to life is not mere existence, but includes the “right to share in the experience of humanity”.<sup>171</sup> It would appear trite that having access to adequate food is a significant part of being human. The argument that the right to life requires a reasonable standard of living has been raised at other times in both court decisions and academic writing. For example, the above view of O'Regan J was approved by the majority in *Soobramoney v Minister of Health (Kwazulu-Natal)*.<sup>172</sup> Khoza argues that those without food are denied life in its real sense.<sup>173</sup> Currie and de Waal's seminal discussion of the Bill of Rights considers this aspect of the right to life as the entitlement to an existence worth living.<sup>174</sup>

It is necessary to add a word of caution to the previous paragraph which calls for the right to food to be protected as part of the right to life. Currie and de Waal indicate that under the South African Bill of Rights it is almost always possible to deal with the state's socio-economic rights obligations in terms of the specific duties in the Bill of Rights as contained in sections 26, 27 and 28 of the Constitution.<sup>175</sup> However, it is submitted that an

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<sup>170</sup> Dobbert in Dupuy (ed) *The Right to Health as a Human Right* (1979) 185.

<sup>171</sup> *S v Makwanyane* 1995 (3) SA 391 (CC) at paras 326 to 327. A similar sentiment was expressed by Mokgoro in the same case at para 311. Sachs J held that the right to life may require the state to create conditions which allow everyone to enjoy human existence. Para 353.

<sup>172</sup> *Soobramoney v Minister of Health (Kwazulu-Natal)* 1998 (1) SA 765 (CC) para 31.

<sup>173</sup> Khoza “Realising the Right to Food in South Africa: Not by Policy Alone- A Need for Framework Legislation” 666. In slightly different terms Khoza submits that people denied adequate food are denied leading a life worthy of its name. Khoza “Realising the Right to Food in South Africa: Not by Policy Alone- A Need for Framework Legislation” 667.

<sup>174</sup> Currie & De Waal *The Bill of Rights Handbook* 289.

<sup>175</sup> Currie & De Waal *The Bill of Rights Handbook* 290.

interpretation of the right to life which encompasses more than merely being alive and extends the concept towards an acceptable standard of being is in accordance with the spirit, purport and objects of the Constitution as a whole. In support of this submission I would draw an analogy with rationale for the decision in the *Makwanyane* case. In this case the death penalty was found to be unconstitutional on the basis of it being a cruel, inhumane and degrading punishment, rather than the perhaps more obvious denial of the right to life.<sup>176</sup> Similarly, in a right to food challenge, whilst the state's right to food obligations in terms of section 27 would be a key consideration, it might be that the court relies on alleged infringements of other rights (like the right to life) in coming to its decision. The court could even go so far as to make its decision on the basis of infringements of interconnected rights rather than (or at least in addition to) an infringement of section 27. Unquestionably, having access to adequate food is a fundamental part of an acceptable standard of existence.

On a more simplistic level, being denied sufficient food may lead to starvation which is clearly a denial of the right to life. The importance of the right to life cannot be overemphasised, as without life no other rights can be enjoyed. It is along these lines of argument that the Constitutional Court in *Makwanyane* found the rights of life and dignity to be the most important fundamental rights as well as the source of the other rights in the Bill of Rights.<sup>177</sup> The *Makwanyane* judgment is also authority for the right to life being unqualified within section 11 itself.<sup>178</sup> The fact that the right to life may only be limited through the provisions of the limitations clause (section 36) provides stronger protection to the right than would exist were the right to be subject to textual qualification. Whilst few statistics on malnutrition and hunger in South Africa<sup>179</sup> indicate the number of deaths caused by these problems, research has shown that deaths from hunger and malnutrition do occur in this country.<sup>180</sup> It is submitted that anyone in South Africa who dies due to malnutrition or hunger has been denied their constitutional right to life.

A more debatable link between the right to food and life was introduced earlier in this dissertation. The introductory Chapter pointed out the well-known link between poor

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<sup>176</sup> *S v Makwanyane* para 137.

<sup>177</sup> *S v Makwanyane* para 144.

<sup>178</sup> *S v Makwanyane* para 85.

<sup>179</sup> See Chapter 1 where hunger and malnutrition statistics for South Africa are provided.

<sup>180</sup> See Liebenberg "The Right to Social Assistance: The Implications of *Grootboom* for Policy Reform in South Africa" (2001) Vol 17 Part 2 *SAJHR* 236 and 245.

nutrition and food insecurity and HIV/ Aids susceptibility. Engh's research shows that food insecurity and malnutrition increase the susceptibility of contracting HIV and the more rapid development of HIV into Aids.<sup>181</sup> Notwithstanding improved medical treatment being available for those living with HIV and Aids, the Aids pandemic remains a major killer in South Africa and world-wide. According to research, an estimated 600 people die daily of Aids-related illnesses in South Africa.<sup>182</sup> It is therefore submitted that a failure to introduce satisfactory means to improve food security and nutrition can be said to infringe the right to life of those who are at a greater risk of contracting HIV and the onset of Aids from HIV due to adequate food being denied to them.

### 3.3.3 THE RIGHT TO EQUALITY

It is arguable that the right to equality is tied in with the right to sufficient food for all residents of South Africa. Chaskalson P held in the *Soobramoney* case that:

“We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom, and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring.”<sup>183</sup>

The *ratio decidendi* of Chaskalson P in the *Soobramoney* is echoed in the sentiments of Yacoob who argues that there can be no equality without socio-economic upliftment.<sup>184</sup> The apartheid era was a time of gross inequality between racial groups. Now that South Africa has moved on to a period of formal equality, where a universal franchise and other aspects of equality and other core rights are espoused in our Constitution, Justice Chaskalson would appear to be correct in holding these first generation rights to have questionable value in a society of gross socio-economic inequality. The existence of extreme socio-economic inequality is evidenced in research showing that food insecurity and malnutrition is

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<sup>181</sup> Engh “Developing Capacity to Realise Socio-Economic Rights. The Example of HIV/Aids and the Right to Food in South Africa” 3.

<sup>182</sup> Engh “Developing Capacity to Realise Socio-Economic Rights. The Example of HIV/Aids and the Right to Food in South Africa” 5.

<sup>183</sup> *Soobramoney v Minister of Health, Kwazulu-Natal* 1997 (12) BCLR 1696 (CC) at para 8. This case is discussed more fully in Chapter 6 of this dissertation.

<sup>184</sup> In Jagwanth and Kalula *Equality Law: Reflections from South Africa and Elsewhere* (2003) 7.

geographically and demographically unevenly distributed, with food insecurity highest in areas with big rural populations<sup>185</sup> and amongst black households.<sup>186</sup> Ensuring that everyone has enough food and adequate nutrition would go some way towards closing the gap between the so-called “haves” and “have-nots”.

Govindjee argues that equality in respect of access to all socio-economic rights<sup>187</sup> is implied by section 27 indicating that “*everyone*” is entitled to access to the rights therein (own emphasis added).<sup>188</sup> Khoza shows the link between the rights of equality and social assistance by indicating that those who are unable to survive without social assistance are equally desperate and equally in need of such assistance.<sup>189</sup> It is submitted that these compelling arguments are equally applicable in showing the interrelatedness of equality and the right to food in that those who are unable to adequately feed themselves are equally desperate and equally in need of assistance from the state to be properly fed.

### 3.3.4 THE RIGHT TO PROPERTY

In terms of section 25(5) of the Constitution, the state must take reasonable legislative and other steps, subject to resource limitations, to promote conditions for equitable land access.<sup>190</sup> Having access to land can be said to be closely linked to the right to food. This submission is made on the basis that having access to land, particularly arable land, provides people with the potential to feed themselves.<sup>191</sup>

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<sup>185</sup> The Limpopo Province, for example, has been identified as an area with widespread malnutrition and food insecurity. Khoza “Workshop on the Right to Food Security” 23.

<sup>186</sup> Khoza “Realising the Right to Food in South Africa: Not by Policy Alone- A Need for Framework Legislation” 664.

<sup>187</sup> This would include food.

<sup>188</sup> Govindjee *The Constitutional Right to Social Assistance as a Framework for Social Policy in South Africa: Lessons from India* 99.

<sup>189</sup> Khoza “Protecting the Right to Food in South Africa: The Role of Framework Legislation” (2004) Vol 5 No 1 *ESR Review* 3 para 42.

<sup>190</sup> A related sub-section of the Property provision is s 25 (8) which says:

“No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).”

<sup>191</sup> According to the South African Human Rights Commission Fifth Economic and Social Rights Report Series, 2002/2003 (2004), in terms of the Land Redistribution for Agricultural Development sub-programme, during the reporting period only 103 682 hectares of land was delivered, benefiting just 6170 people.

As of 2002 approximately only 1.2% out of the government's espoused 30% post-apartheid land redistribution had taken place and approximately 80% of the best agricultural land was still owned by white commercial farmers<sup>192</sup>. This scenario is aggravated by the vestiges of the apartheid government's homelands- and separate development-policies being evident in a disproportionately high number of black South Africans living on poor agricultural land in the former homelands.<sup>193</sup> It was noted in the statistics on hunger and food insecurity in the introductory Chapter that white South Africans also happen to be the race group with the greatest food security and smallest food shortage.<sup>194</sup> The slow pace of land reform in South Africa does appear to be negatively affecting the ability of previously disadvantaged South Africans to adequately feed themselves. Improving access to land suitable for food production to those susceptible to food insecurity and hunger would appear to be an obvious way of improving access to adequate food in South Africa. However, merely having access to agricultural land without having both the requisite agricultural training or expertise and technology is of little value. This research does not aim to debate at any length whether the speed of land restitution and redistribution is too slow (which it would appear to be), instead the link between the right to land and food is noted. Government's land reform and agricultural development policies and programmes will be considered in Chapter 5 of this dissertation.

### **3.3.5 THE RIGHT TO SOCIAL SECURITY**

In terms of section 27(1)(c) of the Constitution:

“Everyone has the right to have access to-  
social security, including, if they are unable to support themselves and their dependants,  
appropriate social assistance.”

The provision of social security,<sup>195</sup> particularly in the form of social assistance, is undoubtedly closely connected with the right to food. This submission is made on the basis that hungry people receiving social grants are more likely to be able to adequately feed

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<sup>192</sup> Coomans and Yapko “A Framework on the Right to Food- An International and South African Perspective” 29. Coomans and Yapko are citing 2002 figures provided by the Department of Land Affairs.

<sup>193</sup> *Ibid.* The same source indicates that as of 2002 approximately 14 million black South Africans were living in the infertile former homelands.

<sup>194</sup> See footnote 22 in Chapter 1.

<sup>195</sup> S 27(1)(c) of the Constitution.



themselves than those without grants.<sup>196</sup> The provision of adequate social grants for those in special need should also go a long way towards significantly reducing the “deplorable conditions” and “great poverty” referred to in the aforementioned extract from the judgment of Chaskalson P in the *Soobramoney* case.<sup>197</sup>

The seminal *Grootboom* decision, which will be discussed in detail in Chapter 6, ruled that the state must take positive action to meet the needs of those living in extreme poverty, homelessness or intolerable housing.<sup>198</sup> Similar parts of the Court’s decision held that people in urgent and desperate need or a significant segment of society may not be ignored in the interests of a general programme concentrating on medium and long-term aims.<sup>199</sup> Notwithstanding the constitutionally required state action, the court did acknowledge the limitations on the state’s duties contained in section 26(2) as well as the general limitations clause.<sup>200</sup> In applying these court directives to social security and social assistance, subject to defined limitations, the Constitutional Court seems to have interpreted the Constitution as requiring a more comprehensive social security system than currently exists, and more specifically social assistance in crisis situations, in order to deal with the extreme situations it has identified. A widening of the social security “safety-net” and provision of emergency relief in crisis situations would also improve access to adequate food for those in great need.

Various aspects of the existing social security system in South Africa, including the various social assistance grants available, and proposed new social security projects and programmes are discussed at some length in Chapter 5.

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<sup>196</sup> In this regard, see the discussion on the Basic Income Grant (BIG) in Chapter 5. BIG aims to provide a small monetary grant to all South Africans to assist in meeting the most basic of human needs. BIG Financing Group *Breaking the Poverty Trap: Financing a Basic Income Grant in South Africa* 7.

<sup>197</sup> *Soobramoney v Minister of Health, Kwazulu-Natal* 1997 (12) BCLR 1696 (CC) at para 8.

<sup>198</sup> *Government of the Republic of South Africa and Others v Grootboom and Others*. 2000 (11) BCLR 1169 (CC) at para 24.

<sup>199</sup> *Grootboom* paras 43, 44 and 66.

<sup>200</sup> *Grootboom* para 38.

### **3.3.6 THE RIGHT TO WATER**

The links between the right to water and food are fairly self-explanatory and so will not be dealt with in any great detail. Brand notes that access to water is both a pre-requisite for food production and forms a key part of a healthy diet.<sup>201</sup>

### **3.3.7 HEALTH CARE**

Brand highlights that a person's status of health determines their nutritional needs and likewise their nutritional status is a big factor affecting health.<sup>202</sup> This argument has been elaborated upon elsewhere in this research in relation to the food needs of those suffering from HIV and Aids.

### **3.3.8 EDUCATION**

By creating greater capacity to earn a reasonable income, education can be said to promote the right to food in that the money earned can be used to buy adequate food. In addition to this, Brand points out that education allows a person to eat more nutritiously by knowing the nutritional value of particular foodstuffs as well as how to store and prepare the food so as to maximise the nutritional value received.<sup>203</sup> Being properly fed is also necessary for creating an environment conducive to learning. A hungry or malnourished child, if attending school at all, is unlikely to learn properly.

## **3.4 LIMITATIONS ON THE RIGHT TO FOOD**

The right to food in section 27(1)(b) may be limited in terms of its own in-built limitations (in section 27(2)) or in terms of the more generic limitation requirements of section 36(1). Much of the discussion in the previous Chapter on internal limitations of all socio-economic rights in the Constitution and the application of section 36 thereto apply *mutatis mutandis* to the

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<sup>201</sup> Brand "The Right to Food" in Brand and Heyns (eds) *Socio-Economic Rights in South Africa* 163.

<sup>202</sup> Brand considers the rights to health care and education as of particular importance to the right to food. Brand "The Right to Food" in Brand and Heyns (eds) *Socio-Economic Rights in South Africa* 164.

<sup>203</sup> *Ibid.*

right to food specifically. Rather than repeating the discussion here, this section will focus on possible limitations peculiar to the right to food.

In relation to internal limitations of a right, Engh highlights the need to distinguish between a lack of willingness by a government to provide a right on the one hand and the inability or incapacity to do so on the other.<sup>204</sup> There is more than sufficient food in South Africa to adequately feed everyone living here<sup>205</sup>; the problem is the allocation of resources, not a lack of resources.<sup>206</sup> South Africa, with an estimated gross national per capita income of 3 200 American dollars, has been called the richest country in Africa.<sup>207</sup> However, directly mirroring the provision of food, it is not the existence of sufficient financial capital which is the key challenge, but rather its highly skewed distribution. Hence it is submitted that the normal internal limitations (of progressive realisation subject to available resources) applicable to socio-economic rights are less of an issue in relation to the right to food in South Africa.<sup>208</sup>

It is submitted that both section 27(2) and section 36(1) provide a very limited ambit in which the right to food may be justifiably limited. It is suggested, for example, that no limitation of the right to food which would allow for anyone living in South Africa to die of starvation or even suffer from severe hunger or malnutrition could ever pass the constitutional muster. Following the two-stage approach to constitutional adjudication mentioned in the previous Chapter, this argument is made on the following basis in relation to someone who is facing death due to starvation. Firstly, the starving applicant is undoubtedly being denied the right to adequate food as contained in section 27(1)(c). It is submitted that the applicant would be able to prove that the infringement of section 27(1)(c) is not legitimised by the internal limitation of section 27(2). This last submission is made on the basis that due to the availability of sufficient food to adequately feed everyone in South Africa (as illustrated in

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<sup>204</sup> Engh “Developing Capacity to Realise Socio-Economic Rights. The Example of HIV/Aids and the Right to Food in South Africa” 3.

<sup>205</sup> Brand “Food Security, Social Security and Grootboom” *ESR Review* Vol 3 No 1 July 2002.

<sup>206</sup> This situation is confirmed by a relatively recent case study of the United Nation’s Food and Agricultural Organisation that South Africa has been producing enough food at a national level for the last 20 years to feed its whole population. Cited by Engh “Developing Capacity to Realise Socio-Economic Rights. The Example of HIV/Aids and the Right to Food in South Africa” 4.

<sup>207</sup> Engh “Developing Capacity to Realise Socio-Economic Rights. The Example of HIV/Aids and the Right to Food in South Africa” 4.

<sup>208</sup> The *Soobramoney* case relating to the right to health care, in which a kidney dialysis machine was denied to Mr Soobramoney on the basis of insufficient resources, is thus distinguishable from the right to food. 1997 (12) BCLR 1696 (CC). This case will be discussed in detail in Chapter 6.

the previous paragraph), reasonable state measures would not allow someone to die of starvation. Finally, it is suggested that the state would be unable to prove that the infringement is permitted in terms of section 36 in that it cannot be conceived how a law of general application which could allow for such a situation could be found to be reasonable and justifiable.

It could be argued that limitations as to who has *locus standi* in terms of an alleged breach of section 27(1)(b) could serve as an indirect limitation of the right. However, I have already argued in the previous Chapter that the *locus standi* provision as contained in section 38<sup>209</sup> of the Constitution casts the *locus standi* net very wide as to who may bring a matter to court when alleging the infringement of a fundamental right. On this basis it is suggested that the broad provisions of section 38 provide hungry and malnourished people every opportunity to seek the assistance of the courts.

It has already been noted that the right to food has yet to be tested before our courts. However, the qualification as to what it means for the state to take reasonable measures within its available resources to achieve progressive realisation of a right has already been considered by the Constitutional Court in relation to adequate housing, health care and social assistance.<sup>210</sup> This same caveat or qualification applies to the right to food in section 27(1)(b). In Chapter 6 when these analogous constitutional challenges are examined parallels will be drawn as to what they indicate about a qualification on the right to food.

The right of children to basic nutrition in section 28(1)(c) is not subject to any internal limitations and can thus only be limited in terms of section 36. It is submitted that children can be considered vulnerable groups in that they do not ordinarily have the means to feed themselves and are under the control and protection of others. Bearing in mind their vulnerable status and section 36's requirements of a reasonable and justifiable law of general application to limit a right, it is hard to conceive of any scenario in which these rights could be legitimately limited by the state.

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<sup>209</sup> The exact provisions of s 38 were quoted earlier in this dissertation.

<sup>210</sup> The cases in question were respectively Grootboom (*supra*), TAC (*supra*) and Khosa (*supra*).

### 3.5 TAKING VARIOUS ASPECTS OF THE RIGHT TO FOOD FURTHER

In being guided by the Preamble, it is submitted that in a democratic and just society where basic human rights are both valued and protected and improved standards of living for all are sought, a generous interpretation needs to be given to the right to food as found in the Constitution. For it is surely perverse for there to be people suffering from hunger and malnutrition in a country where there is such strong protection of fundamental rights.

Stryker argues that improved medical care and provision of food are the aspects of social security which are able to provide the most striking improvement in improving the quality of life of those suffering from poverty.<sup>211</sup> It is agreed that health care and sufficient and adequate food are key ingredients of a reasonable standard of living. However, the link between these two key socio-economic challenges can be taken further. It has already been argued that the right to food in the South African Constitution takes on a growing significance in light of the considerable implications of HIV/ Aids for realising the right to food.<sup>212</sup> The link between these two key challenges facing contemporary South Africa was the subject of a workshop held in the Limpopo Province in June 2002 into the impact of food insecurity in the light of the HIV- Aids crisis.<sup>213</sup> It is submitted that the apparent link between these two crucial socio-economic challenges can be justifiably extended in that improved provision of sufficient food to all people living in South Africa will invariably have positive health implications.

One way of ensuring that people have sufficient food is to ensure that they have the means to properly feed themselves. Various types of poverty alleviation may have the positive result of reducing hunger and malnutrition. Whilst poverty alleviation may take many forms, such as employment creation schemes, this research will focus on the provision of direct assistance to those with the greatest food needs. This is not to say that feeding schemes and other direct assistance should operate in isolation. On the contrary, it is submitted that economic upliftment and particularly job creation are necessary for building a better life for all South Africans. However, if the economy cannot create sufficient jobs to enable people to support

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<sup>211</sup> Stryker "Common Diagnostic Framework for Poverty Reduction" in Middleton, O'Keefe and Visser (eds) *Negotiating Poverty: New Directions, Renewed Debate* (2001) 78.

<sup>212</sup> Engh "Developing Capacity to Realise Socio-Economic Rights. The Example of HIV/Aids and the Right to Food in South Africa" 4.

<sup>213</sup> Khoza "Workshop on the Right to Food Security" 23.

themselves and their dependants (which would include having sufficient food), then clearly direct assistance is called for.<sup>214</sup> Furthermore, it is not acceptable for people in great food need to continue to go hungry or malnourished whilst waiting for (often slow) economic development to ease their plight. The most “food-vulnerable” members of society require immediate and direct assistance, because they are likely to lack the capacity to adequately help themselves and their needs are critically urgent.

### 3.6 INTERNATIONAL LAW POSITION

In relation to the interpretation of all rights in the Bill of Rights, including the right to food, section 39(1)(b) requires consideration of international law. Importantly, however, our courts will not apply any principle of international law unless such a principle is applicable within the context of this country.<sup>215</sup> In addition, the weight of such principle or rule of international law for South African law varies.<sup>216</sup>

Section 232 of the Constitution provides that customary international law applies to South Africa unless in conflict with a parliamentary statute or the Constitution itself. Section 233 requires reasonable interpretation of South African legislation consistent with international law over a different interpretation not in accordance with international law. International law authority on the right to food is therefore relevant to this dissertation both as a possible source of law and as an aid to statutory interpretation.

Malherbe notes that a shortage of local jurisprudence on social security rights makes it predictable that international and comparative law will be used to assist in interpretation of national law.<sup>217</sup> Since the provision of food and food security form key parts of a state’s social security responsibility, it is argued that Malherbe’s call for the need to consider international and foreign law directives is highly applicable. However, it is worth reiterating the comments made earlier in this Chapter that the right to food is inextricably linked with

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<sup>214</sup> Adapted from Mashava “Introduction to the Right to Social Security in the South African Constitution” in Mashava (ed) *A Compilation of Essential Documents on Economic, Social and Cultural Rights: Economic and Social Rights Series* (2000) 1.

<sup>215</sup> Khoza “Realising the Right to Food in South Africa: Not by Policy Alone- A Need for Framework Legislation” 668.

<sup>216</sup> *Grootboom* para 26.

<sup>217</sup> Malherbe “The Co-ordination of Social Security Rights in Southern Africa: Comparisons With (and Possible Lessons to be Learnt From) the European Experience” 80.

other rights. Eide points out that although rights are always linked, this is particularly the case with the right to food in international law.<sup>218</sup>

A useful starting point in relation to the provision of sufficient food is an exposition of what sufficient food entails. The United Nations (UN) Committee on Economic, Cultural and Social Rights provides a useful starting point by stating that everyone has the right to:

“physical and economic access to adequate food or means for its procurement.”<sup>219</sup>

The Committee went on to stress that the right to food should not be interpreted narrowly in that states have a core duty to take the requisite action to mitigate and reduce hunger even in times of natural and man-made disasters.<sup>220</sup> Although the Committee’s comments provide a useful starting point, it remains to be established what exactly is required to have adequate or sufficient food. The General Comment of the UN Special Rapporteur on the Right to Food is more specific in providing a comprehensive and satisfactory definition of the right to food as:

“The right to have regular, permanent and unobstructed access, either directly or indirectly by means of financial purchases, to quantitatively and qualitatively adequate and sufficient food corresponding to the cultural traditions of the people to which the consumer belongs, and which ensures a physical and mental, individual and collective, fulfilling and dignified life free from anxiety.”<sup>221</sup>

The next part of this Chapter will seek guidance from particular international human rights instruments which impact on the right to food.

### 3.6.1 THE UN DECLARATION OF HUMAN RIGHTS<sup>222</sup>

Liebenberg notes that whilst the Declaration is not in itself a legally-binding document, it has a very high status as both a benchmark of achievement worldwide and as an authoritative guide to the interpretation of the UN Charter. Furthermore, various rights in the Declaration

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<sup>218</sup> Eide *The Right to Adequate Food and to be Free from Hunger* (1999). Cited in Brand “The Right to Food” in Brand and Heyns (eds) *Socio-Economic Rights in South Africa* 163.

<sup>219</sup> 1999 *General Comment 12* of the Committee on Economic, Cultural and Social Rights cited in *The Right to Food* The South African Human Rights Commission Fifth Economic and Social Rights Report Series, 2002/2003 (2004) 9.

<sup>220</sup> *Ibid.*

<sup>221</sup> *The Right to Food*, Report by the UN Special Rapporteur 2000/10, 7 February 2001.

<sup>222</sup> The 1948 Declaration was approved in terms of Resolution 217A(III) by the UN General Assembly.

are now considered to have become customary international law.<sup>223</sup> Leading international law academic, Dugard, adds that the Declaration has had a huge impact on the development of human rights around the world. For example, he notes that it inspired various international and regional instruments which followed it (such as the International Covenant on Civil and Political Rights) as well as serving as a model for numerous national Bills of Rights.<sup>224</sup>

It is logical to start this analysis of international human rights instruments with the UN Declaration due to its status as the foundation upon which so many other instruments have been built. The usefulness of studying the Declaration in this research is apparent in that it fits perfectly into the aforementioned aims of using international law as both an interpretative tool and as a source of customary international law. Dugard highlights the particular value of the Declaration in a post-apartheid South Africa committed to human rights.<sup>225</sup> He argues that the Declaration was inspirational to the drafters of the South African Bill of Rights and has a constructive role to play as a guide to our courts in their interpretation of laws affecting human rights. Dugard indicates that courts in other jurisdictions have used the Declaration for this purpose.<sup>226</sup>

The key articles of the Declaration applicable to this research are articles 22 and 25. Article 22 applies to social security generally and says:

“Everyone ... has the right to social security and is entitled to realisation through national effort and international co-operation and in accordance with the organisation and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.”<sup>227</sup>

Article 25 of the Declaration provides, amongst other things, for an adequate standard of living for everyone including their family. Article 25 specifically provides for the right to food, social services and social security for vulnerable persons.<sup>228</sup>

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<sup>223</sup> Liebenberg “The International Covenant on Economic, Social and Cultural Rights and its Implications for South Africa” 360.

<sup>224</sup> Dugard *International Law: A South African Perspective* (2000) 240.

<sup>225</sup> Dugard *International Law: A South African Perspective* 242.

<sup>226</sup> *Ibid.*

<sup>227</sup> Quoted in Malherbe “The Co-ordination of Social Security Rights in Southern Africa: Comparisons With (and Possible Lessons to be Learnt From) the European Experience” 76.

<sup>228</sup> *Ibid.*



The Declaration thus provides for the right to food in international law. Furthermore, it is submitted that articles 22 and 25 are useful for interpretation of, in particular, section 27(1)(b) of the Constitution. In relation to the meaning of “sufficient food” in section 27, it is submitted that this can be understood in light of article 25 to mean an entitlement to the food necessary for an adequate standard of living. For example, a child who is not properly fed and as a result is not able to concentrate at school is not receiving “sufficient food” as basic education is needed for an adequate standard of living. In addition, article 22 supports the submission made earlier in this Chapter of the interconnectedness of the right to food and the right to dignity. This last submission is made on the basis that applying article 22 of the Declaration to section 27 of the Constitution, everyone in South Africa has the right to the food necessary to maintain their “dignity and the free development of (their) personality”.

### **3.6.2 INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (ICESCR)**

The ICESCR of 1966 was drafted to give effect to the socio-economic rights contained in the U.N. Declaration of Human Rights. South Africa is a signatory thereto but has not yet ratified the Covenant. Engh points out that despite South Africa’s non-ratification of the Covenant to date, many of the socio-economic rights in the Constitution are the same as those in the Covenant.<sup>229</sup>

In terms of article 18 of the Vienna Convention on the Law of Treaties of 1969, a state must not commit acts which would defeat the object and purpose of a treaty. As a signatory to the ICESCR, South Africa must therefore not commit acts which would go against the object and purpose of the ICESCR.<sup>230</sup> For example, article 9 of the ICESCR expresses the clear aim of recognising the right to social security, incorporating social assistance.

The wording of section 27(2) of the South African Constitution is extremely close to that of article 2(1)<sup>231</sup> of the ICESCR.<sup>232</sup> Because of this very close similarity, interpretations of

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<sup>229</sup> Engh “Developing Capacity to Realise Socio-Economic Rights. The Example of HIV/Aids and the Right to Food in South Africa” 3.

<sup>230</sup> The same requirements obviously apply to other treaties which South Africa has signed.

<sup>231</sup> Article 2(1) provides for progressive realisation of the listed rights to the maximum of a country’s resources.

<sup>232</sup> South Africa signed the ICESCR on 3 October 1994. United Nations website. Accessed at [www.unhchr.ch/pdf/report.pdf](http://www.unhchr.ch/pdf/report.pdf) on 22 May 2006.

article 2(1) by the United Nations Committee on Economic, Social and Cultural Rights are valuable when interpreting the ambit and meaning of section 27. The Committee's definition (in its General Comment 12) of what realising the right to adequate food means, has already been discussed earlier in this Chapter. However, Govindjee correctly points out that the Committee's findings are general comments unencumbered by the budgetary constraints of particular countries.<sup>233</sup> As will be seen in much more detail in Chapter 6, South African court decisions have sometimes incorporated the Committee's comments in their judgments and at other times rejected them.<sup>234</sup>

Other provisions relating to food and nutrition in the ICESCR are to be found in article 11 thereof. Article 11(1) provides that:

“State parties recognise the right of everyone to an *adequate standard of living* for himself and his family, *including adequate food*, clothing and housing, *and to the continuous improvement of living conditions*.”<sup>235</sup> (own emphasis added)

Coomans and Yapko regard article 11 as being the key provision governing the right to food in international law.<sup>236</sup> Assistance with the interpretation of article 11 has been provided by the Committee on Economic Social and Cultural Rights' General Comment 12 of May 1999 on the right to adequate food.<sup>237</sup> Further clarity as to the positive and negative duties on states to respect, protect and fulfil the rights in Article 11 have been provided by the UN's Special Rapporteurs on the Right to Food.<sup>238</sup>

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<sup>233</sup> Govindjee *The Constitutional Right to Social Assistance as a Framework for Social Policy in South Africa: Lessons from India* 89.

<sup>234</sup> For example, the Constitutional Court in the first *TAC* case 2002 (10) BCLR 1033 (CC) 1060 [34] rejected the Committee's interpretation of what a minimum core obligation entails. In terms of the ICESCR, a state party is under a minimum core obligation to satisfy certain basic needs and minimum standards for a dignified human existence and a failure to do so would *prima facie* amount to a breach of the Covenant's obligations. The Constitutional Court held that minimum core obligations could not always be demanded, but was rather an indicator of the reasonableness of state actions. It is submitted, however, that the Constitutional Court's rejection of minimum core obligations in the *TAC* is not applicable to the rights of children in s 28 and prisoners in s 35 due to the lack of internal limitations in these sections. See also the arguments made in Chapter 6 that the *Grootboom* can be interpreted as effectively recognising minimum core obligations despite appearing to say the contrary.

<sup>235</sup> Accessed at [www.unhchr.ch/pdf/report.pdf](http://www.unhchr.ch/pdf/report.pdf) on 22 May 2006.

<sup>236</sup> Coomans & Yapko “A Framework on the Right to Food- An International and South African Perspective” 18.

<sup>237</sup> Vidar “Towards Voluntary Guidelines on the Right to Food” 12.

<sup>238</sup> Coomans & Yapko “A Framework on the Right to Food- An International and South African Perspective” 18.

Article 11(1) clearly recognises the right to food as an international human right. Furthermore, the right to continuous improvement of living conditions links with the need for progressive realisation of the right to food as espoused in section 27(2) of the South African Constitution. Article 11(1) therefore iterates the contents of section 27(2) rather than providing any new guidelines for its interpretation.

Article 11(2) provides that state parties recognise more urgent steps may be needed to guarantee the right to be free from hunger and malnutrition.<sup>239</sup> Article 11(2), it is submitted, provides extremely helpful insight into how the right to food in the South African Constitution should be interpreted in times of emergency. In times of natural or man-made emergency or crisis, such as droughts and wars respectively, susceptibility to food shortages and malnutrition will increase. It is submitted that the right to food in section 27(1)(b) should be understood in light of article 11(2) of the ICESCR to include the right to emergency food aid when the need arises. As a corollary thereto, the South African government must put into place adequate emergency feeding measures for such crisis situations.

### **3.6.3 THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS**

Due to our location on this continent, one should not rely only on international instruments without due consideration of relevant African human rights instruments applicable to South Africa. The African Charter on Human and Peoples' Rights (the African Charter) serves as a leading instrument in this regard. The African Commission on Human and Peoples' Rights is intrinsically linked to the African Charter and interprets its provisions and thus its findings should also be considered.

The African Charter contains economic, social and cultural rights. De Vos notes that as in the South African Bill of Rights, socio-economic rights in the African Charter are not contained in their own separate section which indicates the relatedness and interdependence of these and other rights.<sup>240</sup> Similarly, Odinkalu, commenting on the African Charter, observes that:

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<sup>239</sup> *Ibid.*

<sup>240</sup> De Vos "A New Beginning? The Enforcement of Social, Economic and Cultural Rights Under the African Charter on Human and Peoples' Rights" 9.

“economic, social and cultural rights are placed on the same footing as all other rights in the Charter.”<sup>241</sup>

It can be argued that the *Media Rights Agenda and Constitutional Rights Project v Nigeria*<sup>242</sup> case provides authority for arguing that the state should ensure that everyone in their country has access to sufficient food. The case held that the right to food is implicitly protected in the African Charter because it is indivisibly linked to human dignity and is therefore needed for the realisation of such other rights as health, education, work and political participation.<sup>243</sup> The *Media Rights Agenda and Constitutional Rights Project* case is also backing for the earlier argument that the existence of the right to dignity in the South African Constitution indirectly promotes the right to adequate food for all.<sup>244</sup>

State parties are required to realise rights in the African Charter immediately, without any progressive realisation proviso.<sup>245</sup> Whilst section 27 of the South African Constitution does allow for progressive realisation of the listed socio-economic rights, it is argued that the African Charter is authority for arguing that the rights of children to adequate nutrition must be immediately met. The logic for this submission is that in the absence of any internal limitation on a right (as is the case with sections 28), the African Charter’s requirement of immediate realisation is apposite.

De Vos notes that the African Commission has indicated a requirement of reasonableness in relation to states implementing socio-economic rights.<sup>246</sup> This international authority aligns with our Constitutional Court’s finding in the *Grootboom* case that steps will be reasonable where they are based on coherent and comprehensive policies and programmes, reasonable in conception and implementation.<sup>247</sup> A programme excluding a significant segment of society is not reasonable and to be reasonable measures must consider the degree and extent of any

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<sup>241</sup> Quoted in De Vos “A New Beginning? The Enforcement of Social, Economic and Cultural Rights Under the African Charter on Human and Peoples’ Rights” 16.

<sup>242</sup> *Media Rights Agenda and Constitutional Rights Project v Nigeria* 12th Activity Report 1998-1999.

<sup>243</sup> *Media Rights Agenda and Constitutional Rights Project v Nigeria* para. 64.

<sup>244</sup> *Supra*.

<sup>245</sup> De Vos “A New Beginning? The Enforcement of Social, Economic and Cultural Rights Under the African Charter on Human and Peoples’ Rights” 20.

<sup>246</sup> De Vos “A New Beginning? The Enforcement of Social, Economic and Cultural Rights Under the African Charter on Human and Peoples’ Rights” 22.

<sup>247</sup> *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC) at para. 42. The South African government’s hunger relief programmes are considered in Chapter 5.

right which is denied.<sup>248</sup> As the *Grootboom* decision and other leading South African constitutional decisions are analysed in Chapter 6, it suffices at this stage to point out the link between the findings of the African Commission and our Constitutional Court.

#### **3.6.4 SOUTHERN AFRICAN DEVELOPMENT COMMUNITY (SADC) TREATY AND THE CHARTER OF FUNDAMENTAL SOCIAL RIGHTS IN THE SOUTHERN AFRICAN DEVELOPMENT COMMUNITY**

Article 5 of the SADC Treaty provides for regional integration to:

“support sustainable and equitable economic growth and socio-economic development that will ensure poverty alleviation with the ultimate objective of its eradication, enhance the standard and quality of life of Southern Africa and support the socially disadvantaged.”<sup>249</sup>

The Charter of Fundamental Social Rights reiterates these calls for regional development. In article 10 thereof it provides for adequate social protection for all workers in the region. It also provides for social assistance for those unable to support themselves.<sup>250</sup>

Both the SADC Treaty and the Charter of Fundamental Social Rights would appear to support meaningful realisation of the right to food in South Africa as part of the region’s poverty alleviation and social protection programmes. This submission is grounded in article 5 of the SADC Treaty and article 10 of the Charter of Fundamental Social Rights themselves. In relation to the SADC Treaty, means which promote economic growth and socio-economic development for poverty alleviation would logically include improved food security and nutrition. Similarly, in relation to the Charter of Fundamental Social Rights, social assistance for those unable to support themselves would provide better means for such vulnerable people to adequately feed themselves.

#### **3.6.5 VOLUNTARY GUIDELINES FOR THE PROGRESSIVE IMPLEMENTATION OF THE RIGHT TO FOOD**

The latest development coming from the United Nations has been the Voluntary Guidelines for the Progressive Implementation of the Right to Food (which I will call the Voluntary

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<sup>248</sup> *Ibid.*

<sup>249</sup> Cited in Malherbe “ The Co-ordination of Social Security Rights in Southern Africa: Comparisons With (and Possible Lessons to be Learnt From) the European Experience” 69.

<sup>250</sup> *Ibid.*

Guidelines).<sup>251</sup> The U.N.'s Food and Agricultural Organisation, through the Intergovernmental Working Group on the Right to Food (IGWG), started formulating the Voluntary Guidelines in March 2003.<sup>252</sup> The Voluntary Guidelines built upon the earlier Rome Declaration on World Food Security. The Rome Declaration confirmed the right to adequate food and to be free from hunger. The Declaration further recognised that a democratic dispensation and a culture of human rights create the requisite environment for achieving food security.<sup>253</sup>

Windfuhr sees the formulation of the Voluntary Guidelines as a major step forward in the protection of socio-economic rights at an international level in that for the first time such a document is the product of inter-governmental negotiation rather than merely the work of a U.N. expert committee.<sup>254</sup> It is fair to assume that such a consultative process is more likely to result in voluntary compliance from states who themselves were directly part of creating the Voluntary Guidelines. Vidar believes that the Voluntary Guidelines should help states review their strategies, plans, institutions and legislation pertaining to the right to food.<sup>255</sup>

Windfuhr highlights a number of other perceived strengths of the Voluntary Guidelines.<sup>256</sup> For example, the definition of the right to food in the Voluntary Guidelines goes beyond mere access to food to include access by individuals and groups to productive resources. Furthermore, the text reaffirms that states must continue to respect existing access to food and protect people from being deprived of food by others. States must use their available resources to progressively realise the right to food and take immediate steps to start the process. This last-mentioned aspect of the Voluntary Guidelines accords with the interpretation of section 27 given earlier in this Chapter. Finally, Windfuhr indicates that in terms of the Voluntary Guidelines groups which are vulnerable to food shortages and

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<sup>251</sup> Windfuhr "No Masterpiece of Political Will. The Last Stage of Negotiations on Voluntary Guidelines on the Right to Food" *ESR Review* Vol 5 No 4 (2004) 16.

<sup>252</sup> *Ibid.*

<sup>253</sup> Vidar "Towards Voluntary Guidelines on the Right to Food" 12.

<sup>254</sup> Windfuhr "No Masterpiece of Political Will. The Last Stage of Negotiations on Voluntary Guidelines on the Right to Food" 16.

<sup>255</sup> Vidar "Towards Voluntary Guidelines on the Right to Food" 14.

<sup>256</sup> Windfuhr "No Masterpiece of Political Will. The Last Stage of Negotiations on Voluntary Guidelines on the Right to Food" 16. Other advantages of the Voluntary Guidelines identified by Windfuhr are its use as a benchmark with which to test government performance and its sensible indication that the right to food must start with an assessment of the causes of hunger and a critical analysis of food law and policy. *Ibid.*

malnutrition must be given special help.<sup>257</sup> It will be seen in Chapter 6 that the need to make special socio-economic provision for particularly vulnerable groups has been recognised by the Constitutional Court.<sup>258</sup>

Despite its perceived strengths, the Voluntary Guidelines are not above criticism. As the standards it sets are merely guidelines not law, there is no legal obligation to follow them. The Voluntary Guideline's lack of a legal basis links with a critique by Windfuhr that much of its language is too weak, which allows too much room for discretion when it comes to the Voluntary Guideline's requirements.<sup>259</sup>

Notwithstanding any weaknesses, the Voluntary Guideline's provision of a framework for the right to food for the various members of the U.N.'s Food and Agricultural Organisation appears to be a positive development. However, Windfuhr astutely points out that the ultimate worth of the Guidelines will depend on the political will of governments to properly implement its provisions and the effective monitoring of realisation of the right to food.<sup>260</sup>

### **3.6.6 SELECTED INTERNATIONAL INSTRUMENTS WHICH PROTECT PARTICULAR VULNERABLE GROUPS**

#### **3.6.6.1 CONVENTION ON THE RIGHTS OF THE CHILD<sup>261</sup>**

Article 24 thereof provides that every state shall take appropriate measures:

“to combat disease and malnutrition ... and ... the provision of adequate nutritious foods”.

South Africa both signed and ratified this Convention and is hence bound by its provisions.<sup>262</sup> Article 24 provides international law authority for the contents of section 28(1)(c) of the Constitution, as well as providing guidance as to the ambit of the right. Article 26 of the Convention on the Rights of the Child provides for every child to benefit

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<sup>257</sup> *Ibid.*

<sup>258</sup> *Grootboom* Para 45 and see the detailed discussion of the case in Chapter 6.

<sup>259</sup> Windfuhr “No Masterpiece of Political Will. The Last Stage of Negotiations on Voluntary Guidelines on the Right to Food” 16.

<sup>260</sup> *Ibid.*

<sup>261</sup> Ratified by South Africa in 1995.

<sup>262</sup> Information obtained from the website of the Office of the United Nations High Commissioner for Human Rights. Accessed at [www.ohchr.org/english/countries/ratification/11.htm](http://www.ohchr.org/english/countries/ratification/11.htm) on 26 January 2007.

from social security. As has already been argued early in this Chapter, the provision of food and basic nutrition, especially for children, is a core part of a state's social security responsibility.

Sloth-Nielsen highlights the duties placed on the state by article 19(2) of the Convention, which requires effective procedures for establishing programmes to provide the necessary support for children and their care-givers.<sup>263</sup> It is argued that the type of necessary support envisaged by article 19(2) must incorporate measures for adequate feeding of children.

Article 27 of the Convention provides for the right to an adequate standard of living for all children. Although the primary duty for a child's development rests with his or her guardian, this article requires states to take proper measures to assist therein. It is submitted that the drafters of the Convention clearly had in mind sufficient food and basic nutrition amongst the bundle of rights needed to provide for an "adequate standard of living for all children".

### **3.6.6.2 THE CONVENTION ON THE ELIMINATION OF ALL DISCRIMINATION AGAINST WOMEN**

This Convention, ratified by South Africa, indicates that in situations of poverty women are more vulnerable than men to food shortages and other problems.<sup>264</sup> In recognition of this vulnerability, Article 12(2) of the Convention dictates that:

"State parties shall ensure to women ... adequate nutrition during pregnancy and lactation."

It is notable that the South African Constitution fails to identify the particular nutritional needs of women. However, the equality clause expressly forbids discrimination on the grounds of gender.<sup>265</sup> It is therefore submitted that the right to food in section 27(1)(b) of the Constitution should be read in such a way as to meet the particular dietary needs of women as the bearers of children, as highlighted in Article 12(2). Furthermore, government measures to counter food insecurity, hunger and malnutrition in South Africa need to take cognisance of

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<sup>263</sup> Sloth-Nielsen "The Child's Right to Social Services, the Right to Social Security, And Primary Prevention of Child Abuse: Some Conclusions in the Aftermath of Grootboom" (2001) Vol 17 Part 2 *SAJHR* 215.

<sup>264</sup> In Malherbe "The Co-ordination of Social Security Rights in Southern Africa: Comparisons With (and Possible Lessons to be Learnt From) the European Experience" 76.

<sup>265</sup> S 7.



past discrimination against women. This last submission is supported by research into food problems in South Africa which confirms that women are more vulnerable than men to food insecurity and malnutrition.<sup>266</sup>

### **3.6.6.3 THE INTERNATIONAL LABOUR ORGANISATION'S SOCIAL SECURITY (MINIMUM STANDARDS) CONVENTION<sup>267</sup>**

The International Labour Organisation's Social Security Convention aims to set a basic level of social security to be progressively attained world-wide.<sup>268</sup> The Convention refers to nine branches of social security, some of which relate to social assistance for sickness, invalidity, old age and unemployment. The link between social assistance and the right to food as a way of allowing hungry people to feed themselves has already been made earlier in this Chapter and will therefore not be repeated here.<sup>269</sup> It is argued that the progressive realisation of social assistance to vulnerable groups, required in terms of the International Labour Organisation's Social Security (Minimum Standards) Convention, provides further indirect international law authority for the South African government to ensure that the right to food is properly met. However, it should be noted that South Africa has yet to ratify the Social Security (Minimum Standards) Convention.<sup>270</sup>

### **3.6.6.4 INTERNATIONAL PLAN OF ACTION ON AGEING AND RELATED ACTIVITIES**

The UN General Assembly's 74<sup>th</sup> Plenary Meeting met to discuss the Implementation of the International Plan of Action on Ageing and Related Activities.<sup>271</sup> Although the Plan of Action does not have the weight of binding law, it is of persuasive authority in interpreting the meaning of rights at a national and international level. In this regard the Plan states:

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<sup>266</sup> Khoza "Realising the Right to Food in South Africa: Not by Policy Alone- A Need for Framework Legislation" 265.

<sup>267</sup> Convention 102 of 1952.

<sup>268</sup> Malherbe "The Co-ordination of Social Security Rights in Southern Africa: Comparisons With (and Possible Lessons to be Learnt From) the European Experience" 78.

<sup>269</sup> South African government policies and programmes concerning food directly as well as related programmes (such as the existing social security and social assistance network) are discussed in Chapter 5.

<sup>270</sup> International Labour Organization. Social Security Department Website. Accessed at [www.ilo.org/public/english/protection/secsoc/areas/legal/conv102.htm](http://www.ilo.org/public/english/protection/secsoc/areas/legal/conv102.htm) on 23 January 2007.

<sup>271</sup> Malherbe "The Co-ordination of Social Security Rights in Southern Africa: Comparisons With (and Possible Lessons to be Learnt From) the European Experience" 78.

“Older persons should have access to *adequate food*, water, shelter, clothing and health care ...”<sup>272</sup> (own emphasis added)

As with gender, age is a prohibited ground of unfair discrimination in terms of section 7 of the South African Constitution. Whilst section 27(1) does not specifically mention additional food rights for older persons, it is submitted that it is a reasonable interpretation thereof that older persons, as a vulnerable group, should benefit from focused state assistance to ensure their right to food is met.

### 3.7 CHAPTER CONCLUSION

This Chapter has attempted to show the broad ambit of the right to food as it is contained in the South African Constitution. Furthermore, it has been shown that the right to food is intrinsically related to other rights in the Bill of Rights with the result that to realise the right to food invariably involves a realisation of these connected rights too.

In relation to the aforementioned international law recognition of the right to social security and specifically the right to food, it is argued that Scheinin is correct to note the recognition in international law of the various aspects of social security as:

“genuine human right(s)”.<sup>273</sup>

However, Vidar wisely notes that recognition of the right to food in international law is not enough in itself. She argues that the right to food needs to be properly understood and the corresponding duties on states put into place and enforced.<sup>274</sup> Much of the remainder of this dissertation will consider how well the South African government has understood its right to food obligations, in light of our Constitutional imperatives, and its policy implementation.

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<sup>272</sup> *Ibid.*

<sup>273</sup> Scheinin. “The Right to Social Security” in Eide, Krause and Rosas (eds) *Economic, Social and Cultural Rights* (1995) 163.

<sup>274</sup> Vidar “Towards Voluntary Guidelines on the Right to Food” 11.

## **CHAPTER 4**

### **THE CONSTITUTIONAL RIGHT TO JUST ADMINISTRATIVE ACTION**

#### **4.1 RATIONALE FOR DISCUSSION OF THE RIGHT TO JUST ADMINISTRATIVE ACTION**

It is not enough for the state to have in place adequate measures to ensure all in South Africa are adequately fed. In addition, in terms of section 33 of the Constitution, the just administrative action provision, the administration of state programmes must be lawful, reasonable and procedurally fair. As state provision of food and adequate nutrition is an administrative action, an analysis of the right to just administrative action will also be explored. Administrative justice is considered important as the way in which state functionaries need to go about administering the right to food is as crucial as the content of the right to food itself. Stated another way, the right to administrative justice and the entitlement to various socio-economic rights, including food, should work together to ensure that everyone has lawful, reasonable and procedurally fair access to the socio-economic right in question. In this succinct analysis of section 33 and its implications for the right to food, I will firstly outline the administrative justice requirements and then apply these to the right to food.

#### **4.2 THE SIGNIFICANCE OF ADMINISTRATIVE JUSTICE REQUIREMENTS**

According to the Constitutional Court in *President of the Republic of South Africa v South African Rugby Football Union*, section 33 serves to regulate how the public administration is run, particularly the required procedures for just administrative action when individual rights are threatened or affected by the action.<sup>275</sup> Similarly, when Arthur Chaskalson was head of the Legal Resources, he indicated that the everyday lives of ordinary people are greatly affected by the manner in which those who hold power over their lives use that authority.<sup>276</sup>

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<sup>275</sup> *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC) at Para 136.

<sup>276</sup> Chaskalson "The Past Ten Years: A Balance Sheet and Some Indicators for the Future" (1989) 5 *SAJHR* 298.

The importance of just administrative action was also stressed by the Constitutional Court in the *South African Rugby Football Union* case in holding that:

“The Constitution is committed to establishing and maintaining an efficient, equitable and ethical public administration which respects fundamental rights and is accountable to the broader public. The importance of ensuring that the administration observes fundamental rights and acts both ethically and accountably should not be understated.”<sup>277</sup>

It has been argued by Mureinik that the incorporation of the right to just administrative action as a constitutional right in South Africa serves to avoid a repeat of abuse of administrative authority as occurred in apartheid South Africa.<sup>278</sup> Furthermore, people affected by administrative action have the right to go to court to review the reasonableness of the action taken. Judicial review of administrative action promotes the requisite checks and balances as part of a desirable system of separation of powers.<sup>279</sup> Plasket argues that administrative law is the key way of protecting those whose rights to social assistance have been adversely affected by administrative action.<sup>280</sup>

On the basis of the aforementioned authority, it is submitted that a discussion of the constitutional right to food would be incomplete without some consideration of the administrative justice requirements of any actual or planned implementation programme. As was stated in Chapter 3, due to a lack of a specific constitutional challenge relating to the right to food to date, analogies must be drawn from constitutional challenges relating to other related rights. In this Chapter constitutional challenges relating mainly to unjust administrative action in the context of social grants are cited.

#### **4.3 ADMINISTRATIVE JUSTICE REQUIREMENTS IN SOUTH AFRICA**

Particular requirements of administrative justice existed in common law in the pre-constitutional era.<sup>281</sup> These common law requirements were adapted and developed in the

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<sup>277</sup> 2000 (1) SA 1 (CC) at para 133.

<sup>278</sup> Mureinik “A Bridge to Where? Introducing the Interim Bill of Rights.” (1994) 10 *SAJHR* 31.

<sup>279</sup> Pieterse “Coming to Terms With Judicial Enforcement of Socio-economic Rights” 386.

<sup>280</sup> Plasket “Administrative Justice and Social Assistance” (2003) Vol 120 (3) *SALJ* 497.

<sup>281</sup> Plasket “Administrative Justice and Social Assistance” 496.

Constitution and further in terms of the Promotion of Just Administrative Justice Act (PAJA).<sup>282</sup>

It has already been stated that section 33(1) of the Constitution requires lawful, reasonable and procedurally fair administrative action. Section 33(2) provides for the right to written reasons to be received when an administrative action negatively affects a person.<sup>283</sup> In line with section 33(3), PAJA provides for the review of particular administrative action and the correct procedures to be followed for acceptable administrative action.<sup>284</sup> Now that PAJA is in place, judicial review of just administrative action is largely in terms of that Act rather than directly in terms of section 33 of the Constitution.<sup>285</sup> The Act fleshes out the requirements of just administrative action in significantly more detail, as well as the remedies in the event of alleged breach. However, section 33 retains an important role as a means of interpreting PAJA.<sup>286</sup> It is submitted that a similar argument could be made as to the interpretative value of the rules of just administrative action under common law. On the basis of these developments, this Chapter will focus on the main requirements of PAJA rather than administrative action in terms of the common law or section 33 directly.

Currie and De Waal indicate that interpretation of PAJA involves two stages. Firstly, it must be determined that the action in question falls within the ambit of the Act. Secondly, it must be established what rights and duties are imposed by the Act.<sup>287</sup> This suggested two-stage approach will be considered in the following section of this Chapter.

#### **4.3.1 THE AMBIT OF PAJA**

The scope of an administrative action is contained in section 1 of PAJA as read with related sections. PAJA applies to the use of public power. More specifically, in terms of section 1 of

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<sup>282</sup> Promotion of Just Administrative Justice Act 3 of 2000.

<sup>283</sup> Related constitutional provisions which can be said to directly promote administrative justice include: access to information in terms of s 32(1) as expanded upon by the Promotion of Access to Information Act (PAIA) 2 of 2000; the creation of institutions to protect constitutional democracy in s 181(1), in particular the Public Protector, Human Rights Commission and Auditor-General; and the right in terms of s 34 to proper adjudication of rights before a court or tribunal (the latter would include an administrative tribunal).

<sup>284</sup> Currie & De Waal *The Bill of Rights Handbook* 644.

<sup>285</sup> *Ibid.*

<sup>286</sup> Currie & De Waal *The Bill of Rights Handbook* 649.

<sup>287</sup> Currie & De Waal *The Bill of Rights Handbook* 650.

the Act, an administrative action, unless expressly excluded in the section,<sup>288</sup> is any administrative decision or proposed decision made in terms of an empowering law by a state organ, or individual exercising public power,<sup>289</sup> with a (generally) negative, direct, external legal effect.<sup>290</sup> In a whole line of decisions, the Constitutional Court has held that administrative action relates to most, but not all, conduct of the administration.<sup>291</sup> Thus applicable administrative action under PAJA relates to decisions connected with routine governance, that being policy-making in accordance with sovereign legislation (as opposed to direct policy-making) and administering legislative policy.<sup>292</sup> Applicable administrative action in terms of PAJA therefore involves the implementation of existing laws.

### 4.3.2 THE REQUIREMENTS OF PAJA

Section 6(2) of PAJA mirrors and expands upon the requirements of administrative justice in section 33 of the Constitution, namely lawfulness, reasonableness and procedurally fairness. In addition, section 5 of PAJA gives effect to the right to reasons as contained in section 33(2) of the Constitution. It is submitted that the right to reasons can be considered as part of the right to procedural fairness and will be analysed as such in this Chapter. Each of these administrative justice requirements will be discussed in turn.

#### 4.3.2.1 LAWFULNESS

Administrators must act in terms of a law for their decision to be acceptable. Thus in determining the lawfulness of an administrative decision or action the court in question must assess if the decision-maker had the authority to take the decision or act as they did. In

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<sup>288</sup> The exceptions are contained in s 1(b)(aa) to (ii) of PAJA. For example, executive actions of the National and Provincial Executive and judicial and legislative functions are excluded.

<sup>289</sup> In *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC) at para 141 it was held that the determination of whether something is classed as an administrative action is dependent on what type of power is being used. In other words, it is the character of the power being exercised rather than whom or what is exercising the power that is determinative.

<sup>290</sup> Paraphrased from summary of Currie & De Waal *The Bill of Rights Handbook* 654

<sup>291</sup> For example, *Permanent Secretary, Department of Education and Welfare, Eastern Cape v Ed-U-College (PE) (Section 21) Inc* 2001 (2) SA 1 (CC) at para 21 held that a decision of the education MEC relating to a formula for allocating subsidies to private schools is an administrative action. In contrast thereto, in *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC) it was held that the State President's appointment of commissions of enquiry was not an administrative action.

<sup>292</sup> Currie & De Waal *The Bill of Rights Handbook* 655.

addition to a general ground of unlawfulness, section 6 of PAJA provides specific grounds of unlawfulness.<sup>293</sup> Currie and De Waal astutely point out that section 33 of the Constitution prevent ouster clauses which aim to prevent courts from reviewing particular actions.<sup>294</sup> The result of the preclusion of ouster clauses in relation to judicial review of administrative action, in section 33 and PAJA, is that a law cannot justify or allow unlawful administrative action.

There have been a number of reported judgments in which administrative action was found to be unlawful in relation to the denial of social assistance grants. For example, in both the cases of *Bacela v MEC for Welfare (Eastern Cape Provincial Government)*<sup>295</sup> and *Kate v MEC for Department of Welfare, Eastern Cape*<sup>296</sup> it was held that the grant applicants had been unlawfully denied pension arrears owing to them. In addition, section 6(2)(g) of PAJA provides that inaction may also amount to unlawfulness in terms of PAJA. Case authority for such unlawfulness is *Mbanaga v MEC for Welfare, Eastern Cape and another*,<sup>297</sup> where the court held a delay of two and a half years to pay an old age pension was unlawful.<sup>298</sup>

#### 4.3.2.2 REASONABLENESS

In relation to reasonableness, section 6(2) of PAJA requires administrative decisions to be rational, and objectively speaking, reasonable. In paraphrasing various parts of section 6(2) of PAJA, Plasket comprehensively indicates that a reasonable administrative act has various elements, the key ones being: good faith; justifiability and rationality; equitable and certain consequences and proportionality.<sup>299</sup> It is submitted that these identified aspects of reasonableness can be elaborated upon and understood as follows. In relation to the good faith requirement, proper consideration must have been taken of relevant considerations and irrelevant factors ignored. The justifiability and rationality requirements are linked with good faith in that the administrator must be able to substantiate the action taken on logical and fair

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<sup>293</sup> For example, an administrator may not have made a decision in bad faith in terms of s 6(e)(v).

<sup>294</sup> Currie & De Waal *The Bill of Rights Handbook* 672.

<sup>295</sup> [1998] 1 All SA 525 (E).

<sup>296</sup> 2006 (4) SA 478 (SCA) para [22] at 489E - G.

<sup>297</sup> 2002 (1) SA 359 (SE).

<sup>298</sup> For a more in-depth discussion of the aforementioned cases and others and other aspects of administrative justice see Plasket "Administrative Justice and Social Assistance" 496.

<sup>299</sup> Plasket "Administrative Justice and Social Assistance" 508.

grounds. The rationality element is expanded upon in the next paragraph. Equitable and certain consequences mean that the administrative action should not result in unfair discrimination in terms of those affected by the action and furthermore the likely result of the action should be apparent to the affected parties. Finally, the proportionality requirement seeks to avoid unduly harsh consequences for those affected by the administrative act in comparison with the advantages gained by the act. In short, a reasonable administrative act is one based upon adequate reasons for the decision made.

Section 6(2)(f)(ii) of PAJA provides for courts to be able to review the rationality of an administrative decision. Currie and De Waal describe this ground of review as a

“means-end model of rational action”.<sup>300</sup>

It is submitted that this so-called means-end model means that the choice of the administrator is rational if it has been chosen because it is an efficient way of achieving the intended outcome. In interpreting the requirements of section 6(2)(f), O'Regan J in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* simplified the concept by holding that an administrative decision may be reviewed if it is a choice that a reasonable decision-maker could not reach.<sup>301</sup> The need for rational administrative decision making was also highlighted by Chaskalson P in *Pharmaceutical Manufacturers Association of South Africa and another: In re ex parte application of the President of the Republic of South Africa* when it was held that the rule of law necessitates that the use of public power by the executive and other functionaries should not be arbitrary. Decisions must have a rational connection with the purpose for which the power was granted, failing which they are in effect arbitrary and will not be reasonable.<sup>302</sup>

Section 6(2)(h) of PAJA provides for what I would term an objective standard of reasonableness by outlawing administrative action which is so unreasonable that no reasonable person could have exercised the power or performed the administrative function in such a way. It is apparent that section 6(2)(h) is very similar in effect to section 6(2)(f) as discussed in the previous paragraph and therefore needs to be taken no further.

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<sup>300</sup> Currie & De Waal *The Bill of Rights Handbook* 676.

<sup>301</sup> *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (4) SA 490 (CC) at para 44.

<sup>302</sup> 2000 (2) SA 674 (CC) at para 85.



According to De Ville, administrative decisions impacting on fundamental rights require a proportionality test in relation to the reasonableness enquiry. This test would involve a consideration of the proportionality between positive and negative results of the action and whether less restrictive means could have been taken to achieve the desired result.<sup>303</sup> This envisaged test will be applied to the right to food later in this Chapter.

Whilst the provision of reasons for an administrative action taken clearly forms part of the procedural fairness of the action,<sup>304</sup> it is submitted that there is also a link between the provision of reasons for an administrative action taken and both the rationality and objectively reasonableness requirement of a just administrative action. The reason for saying this is that the justification for the action taken, apparent from the reasons, may show the action to be rational and objectively reasonable. The relevance of arguing there to be such a link is that an administrative decision taken without adequate reasons could affect the prospects of such action being successfully challenged in court both on the basis of procedural unfairness and unreasonableness. If this submission is correct it would open up another avenue for those affected by an administrative action to argue such an action to be unreasonable.

It is interesting to note that in a long series of cases surveyed by Plasket in which administrative justice was held to have been repeatedly denied in relation to social assistance grants, none of the judgments Plasket analysed were decided on the basis of reasonableness.<sup>305</sup> However, within other spheres of administrative action the reasonableness of particular administrative conduct has been the focus of litigation. For example, although its application to review the administrative conduct failed, the case of *Kemp NO v van Wyk* considered, amongst other aspects, the reasonableness of an administrator's actions.<sup>306</sup> In this case the first respondent was found to have been entitled to evaluate the application (to import antelope) in terms of existing policy. In exercising a discretion the court found the administrative action to have been made lawfully and reasonably.<sup>307</sup> However, in *Kotze v*

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<sup>303</sup> De Ville *Judicial Review of Administrative Action in South Africa* (2003) 215. Cited in Currie & De Waal *The Bill of Rights Handbook* 677.

<sup>304</sup> In terms of s 5 of PAJA.

<sup>305</sup> Plasket "Administrative Justice and Social Assistance" 497 - 514.

<sup>306</sup> 2005 (6) SA 519 (SCA).

<sup>307</sup> *Supra* at (para [10] at 525E - H).

*Minister of Health and another*,<sup>308</sup> the administrative decision by the Director-General of Health in refusing to approve the retirement of an injured employee was found to be unreasonable. The rationale for the latter decision was that the administrator made incorrect and unjustified assumptions in coming to their decision which was unreasonable in that she had not adequately applied her mind to the facts *in casu*.<sup>309</sup>

#### 4.3.2.3 PROCEDURAL FAIRNESS (INCLUDING THE RIGHT TO REASONS)

Procedural fairness requires the administrator to have followed the prescribed procedures in their administrative action. PAJA reinforces the common law principles of natural justice in relation to procedural fairness, namely *audi alteram partem*<sup>310</sup> and *nemo iudex in sua causa*.<sup>311</sup> Required procedures for just administrative action in terms of PAJA (which meet the requirements of *audi alteram partem*) are found in sections 3 and 4 thereof. Section 3, very widely, sets out the procedure required when an administrative action affects any person. Section 4 of PAJA sets out the procedure required when an administrative action affects the public.

In terms of section 3(1) only administrative action which

“materially and adversely affects rights or legitimate expectations of any person must be procedurally fair”.

A decision which materially affects someone has serious consequences. This provision would therefore appear to narrow the ambit of PAJA somewhat.<sup>312</sup> However, the inclusion of not only adversely affected rights, but also legitimate expectations broadens the scope of the Act again.<sup>313</sup>

Section 3(2) of PAJA specifies what is necessary for procedural fairness to exist. Section 3(2)(a) indicates quite simply that a fair administrative procedure depends on the circumstances of each case.

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<sup>308</sup> 1996 (3) BCLR 417 (T).

<sup>309</sup> *Supra*.

<sup>310</sup> Both parties to a dispute have the right to put their case forward. There must be a fair procedure in place to allow for this.

<sup>311</sup> The decision-maker should be impartial and unbiased.

<sup>312</sup> Currie & De Waal *The Bill of Rights Handbook* 666.

<sup>313</sup> *Ibid*.

However, section 3 gives more substance to procedural fairness requirements in terms of compulsory procedural fairness elements in section 3(2)(b) and discretionary elements in section 3(3). Compulsory requirements include adequate notice, the right to make representations and the right to reasons. Discretionary elements, the required presence of which would depend on the circumstances, are assistance for the affected party and such a person's right to appear in person.

*Bushula and others v Permanent Secretary, Department of Welfare, Eastern Cape and another* is an example of a case in which there was held to be administrative injustice due to procedural unfairness.<sup>314</sup> The court held that failing to give the applicant a hearing invalidated the administrative decision taken.<sup>315</sup>

As was stated above, the constitutional right to reasons is given effect to in section 5 of PAJA.<sup>316</sup> Section 5 requires adequate written reasons to be provided on request by a person whose rights have been substantially and negatively affected by an administrative action.<sup>317</sup> The link between the provision of reasons for a decision and the reasonableness of that decision has also already been discussed.

The importance of such reasons being furnished is well illustrated in the minority judgment of Sachs J and O'Regan J in *Bel Porto School Governing Body v Premier of the Western Cape Province* which held that the provision of reasons is a crucial part of judicial review. This is the case because an affected person needs to know the basis for a decision taken against them in order to know whether there are grounds to challenge the administrative act.<sup>318</sup>

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<sup>314</sup> 2000 (2) SA 849 (E). In this case the applicant's disability grant was cancelled without notice to him and without the applicant having the chance to put his case forward.

<sup>315</sup> *Supra* 856D - E.

<sup>316</sup> Currie and De Waal point out that unlike various other aspects of administrative justice in terms of which the Constitution and PAJA built upon common law grounding, there is no general right to reasons in common law for an administrative decision taken. Currie & De Waal *The Bill of Rights Handbook* 678.

<sup>317</sup> Paraphrased from ss 5(1) and 5(2) of PAJA.

<sup>318</sup> 2002 (3) SA 265 (CC) para 159.

The *Bushula* case, cited above, is an example where no reasons for an administrative action taken were furnished.<sup>319</sup> The case of *Nomala v Permanent Secretary, Department of Welfare and another* is an instance where inadequate reasons were furnished for the administrative decision taken.<sup>320</sup>

It is clear that to meet the “adequate reasons” requirement of section 5(2) of PAJA, the administrator who has taken the administrative action must sufficiently substantiate the action taken. Currie and De Waal indicate that adequate reasons must be understandable to the recipient party and precise enough for such a person to understand the reason for the decision.<sup>321</sup> That is not to say that the person seeking reasons for an administrative decision taken against them is entitled to reasons for the decision which are satisfactory to them: as this might never be the case. Rather, the reasons given for the administrative action must be objectively sufficient and phrased in such a way as to be understandable for the applicant.

#### **4.4 APPLYING THE ELEMENTS OF ADMINISTRATIVE JUSTICE TO THE RIGHT TO FOOD**

As was alluded to at the beginning of this Chapter, the provision of just administrative action in relation to food programmes is an essential aspect of ensuring that the food challenges in this country are met. The very reason for discussing administrative justice in the context of this research is that the roll-out of feeding and nutrition programmes must be justly administered for such programmes to have a positive, meaningful affect on those in need. I will now briefly attempt to apply the administrative justice provisions discussed above to the right to food.

In relation to the requirement of lawfulness, the cases cited above holding the denial of social assistance to worthy applicants to be unlawful are notable.<sup>322</sup> Any person who qualifies for a state feeding programme, who is denied access thereto without lawful cause, could challenge such administrative action as unlawful along similar lines.

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<sup>319</sup> 2000 (2) SA 849 (E).

<sup>320</sup> 2001 (8) BCLR 844 (E). This decision held that “pro-forma” grounds for rejection of a social grant, like “not disabled” or “condition is treatable” did not meet the “adequate reasons” requirement of s.5 of PAJA. Rather than being reasons for the decision taken, the standard-form replies to rejected social grant applicants were simply notifications of decisions made.

<sup>321</sup> Currie & De Waal *The Bill of Rights Handbook* 680.

<sup>322</sup> For example, *Bacela v MEC for Welfare (Eastern Cape Provincial Government)* [1998] 1 All SA 525 (E).

In terms of reasonableness, it was noted earlier that administrative decisions impacting on fundamental rights involve a proportionality enquiry to ensure that the action is reasonable.<sup>323</sup> Such a test would involve weighing up the advantages to be gained from taking a particular action against the disadvantages of not taking it. I would argue that there is a clear need for administrative decisions relating to the fundamental right to food to pass such a proportionality test. In the context of a right as paramount to human existence as food, it is further submitted that arguments in favour of administrative action which promotes a broad and generous interpretation of food entitlement are very likely to be reasonable.

The requirement of procedural fairness is applicable to the right to food in many ways. As was already noted, section 3 of PAJA provides the procedure required when an administrative action affects any person. It is submitted that administrative justice relating to state provision of food could be applicable to any person and hence subject to the provisions of section 3 of PAJA. Therefore someone affected by an administrative decision affecting their right to food is entitled to the compulsory procedural fairness elements in section 3(2)(b) including adequate notice (of any hearing to determine the decision to be made), the right to make representations before the decision is made and the right to reasons for the action taken or decision made. Section 4 of PAJA's requirements for when an administrative action affects the public are also relevant. Administrative justice relating to state provision of food does affect the rights of the public and is therefore subject to the provisions of section 4 of PAJA. As the provision of food is a matter of great concern to the public, it is highly conceivable that one or both of the notice and comment procedure or a public inquiry procedures, provided for in sections 4(3) and 4(2) of PAJA respectively, are applicable to the administration of food provision programmes.

In relation to the right to reasons for a decision taken, it has been noted that section 5(2) of PAJA requires "adequate reasons". It is worth reiterating Currie and De Waal's compelling argument that adequate reasons must be understandable to the recipient and sufficiently precise enough for such a person to understand the reasons.<sup>324</sup> It is submitted that this last point is significant in the context of this research, in that lack of adequate food and education often go hand in hand. Thus the reasons given by a state party for denying someone food

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<sup>323</sup> De Ville *Judicial Review of Administrative Action in South Africa* 215. In Currie & De Waal *The Bill of Rights Handbook* 677.

<sup>324</sup> Currie & De Waal *The Bill of Rights Handbook* 680.

needs to be adequate from the perspective of the person seeking the food. The language and register chosen should, it is submitted, be apposite for the person affected by the administrative action. On a more simple level, there is plenty of case authority making it clear that sufficient reasons must be provided for administrative decisions taken. Hence administrative action concerning the right to food sans reasons,<sup>325</sup> or adequate reasons,<sup>326</sup> is reviewable.

#### **4.5 CHAPTER CONCLUSION**

Throughout this dissertation the need for theoretical rights to be converted into meaningful reality has been called for. The rules of administrative justice which are found in the South African common law, Constitution and PAJA ensure that the exercise of executive and bureaucratic power takes place in an acceptable way. In so doing the rules of administrative justice ensure that the obligations on the state created by law are given meaningful realisation through just administrative action which is lawful, reasonable and procedurally fair. These requirements of just administrative action are critically important in the roll-out of state food and nutrition programmes as a crucial part of converting the right to food into reality. Part of Chapter 5, which considers government food policy, will consider whether existing administration of food policies and programmes is meeting the aforementioned requirements of just administrative action.

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<sup>325</sup> For example, *Bushula and others v Permanent Secretary, Department of Welfare and another* 2001 (8) BCLR 844 (E) 2000 (2) SA 849 (E).

<sup>326</sup> For example, *Nomala v Permanent Secretary, Department of Welfare and another* 2001 (8) BCLR 844 (E).

## **CHAPTER 5**

### **PROGRESS IN REALISING THE RIGHT TO FOOD**

#### **5.1 INTRODUCTION TO THE CHAPTER**

The earlier discussion of the ambit of the right to food established that the state is duty-bound to take decisive steps to reduce food insecurity and fight hunger and malnutrition. This Chapter will focus on existing and proposed state mechanisms for realising the right to food. This analysis will first consider the mechanisms involved and thereafter whether through such mechanisms the constitutional obligations discussed in earlier in this dissertation are being met. Whilst the focus will be on food programmes, because of the link between the right to food and other socio-economic rights, it is necessary to briefly consider existing state policies relating to these interconnected rights. The interconnected state programmes which will be considered are those of land redistribution, income generation or job creation and social security.

#### **5.2 MAIN EXISTING NATIONAL STATE FOOD PROGRAMMES AND POLICIES**

##### **5.2.1 INTEGRATED FOOD SECURITY STRATEGY FOR SOUTH AFRICA (IFSS)**

The IFSS was released by the Department of Agriculture and Land Affairs in July 2002.<sup>327</sup> The IFSS was based on a Cabinet decision to

“launch an updated national food security strategy to streamline, harmonise and integrate diverse food security sub-programmes in South Africa”.<sup>328</sup>

This Cabinet decision succinctly indicates the main aims of the IFSS. Other aims of the IFSS are for it to serve as a guide for further development and to co-ordinate sub-policies.<sup>329</sup>

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<sup>327</sup> The IFSS as a whole can be viewed at [www.nda.agric.za/docs/Foodsecurity/FinalIFSS](http://www.nda.agric.za/docs/Foodsecurity/FinalIFSS) (accessed on 25 February 2006).

<sup>328</sup> Quoted in South African Human Rights Commission *The Right to Food* Fifth Economic and Social Rights Report Series, 2002/2003 (2004) 71 Footnote 36.

<sup>329</sup> Department of Agriculture, Republic of South Africa *The Integrated Food Security Strategy for South Africa* (2002) 11.

However, the need for policy to be converted into acceptable implementation is emphasised by the Cabinet's acceptance of the IFSS being conditional upon it being converted into a programme capable of implementation.<sup>330</sup> The IFSS ambitiously states that its goal is to halve hunger, malnutrition and food insecurity by the year 2015.<sup>331</sup>

The central tenet of the IFSS is that food security should be met by ensuring that those in need should gain access to productive resources and thereby be empowered to have nutritious and safe food. Backup measures are then put into place for those who do not gain access to productive resources. In the first instance, such people should benefit from food security interventions which should give them access to income and employment opportunities to improve their ability to buy food. Secondly, those who are unable to benefit from either of the aforementioned measures due to disability or extreme poverty will receive direct state aid.<sup>332</sup>

The IFSS highlights five challenges for South African households vulnerable to food insecurity<sup>333</sup> which the Strategy aims to counter. These are:

- i) insufficient safety nets;
- ii) weak support networks and disaster management systems;
- iii) inadequate and unstable household food production;
- iv) low purchasing power;
- v) poor nutritional status.

Although the IFSS does not clearly explain what these challenges mean further, it is submitted that these challenges, respectively, can be understood as:

- i) There are a lack of back-up plans and mechanisms to ensure access to sufficient adequate food in difficult times.

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<sup>330</sup> South African Human Rights Commission *The Right to Food* Fifth Economic and Social Rights Report Series, 2002/2003 (2004) 11.

<sup>331</sup> Department of Agriculture, Republic of South Africa *The Integrated Food Security Strategy for South Africa* 13.

<sup>332</sup> Summarised from IFSS. Accessed at [www.nda.agric.za/docs/Foodsecurity/FinalIFSS](http://www.nda.agric.za/docs/Foodsecurity/FinalIFSS) on 25 February 2006.

<sup>333</sup> South African Human Rights Commission *The Right to Food* Fifth Economic and Social Rights Report Series, 2002/2003 (2004) 11 and 12.



- ii) Related to the first challenge, households facing food insecurity have few support mechanisms, particularly in times of disaster, such as droughts and floods.
- iii) Vulnerable households are not producing enough food and the supply is not steady.
- iv) Food insecure households do not have enough money to buy sufficient food to meet their needs.
- v) The food available to vulnerable groups is not of a nutritionally good quality.

Aligned with its aforementioned aims, the IFSS identifies seven priority areas to reduce food insecurity and realise the right to food.<sup>334</sup> The IFSS lists these priorities in its perceived order of importance:

- i) Increase the amount of food being produced and traded by households;
- ii) Increase the amount of money being earned and work opportunities;
- iii) Improve nutrition and the safety of food produced;
- iv) Widen safety nets and food crisis management systems;
- v) Advance investigation and information management systems;
- vi) Provide capacity building;
- vii) Discuss food issues amongst the various stakeholders.

These perceived focus areas will be analysed later in this dissertation in relation to the assessment of existing state action in this Chapter as well as in when proposals are put forward in the concluding Chapter.

## **5.2.2 AGRICULTURAL PROGRAMMES**

### **5.2.2.1 INTEGRATED MANAGEMENT OF AGRICULTURAL WATER USE**

There are various reasons for the need for policy controlling water usage for agriculture. South Africa has limited water available for agricultural purposes and modern South Africa inherited from the apartheid era an uneven distribution of irrigation infrastructure along race

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<sup>334</sup> South African Human Rights Commission *The Right to Food* Fifth Economic and Social Rights Report Series, 2002/2003 (2004) 12.

and geographical lines.<sup>335</sup> The National Guidelines for Integrated Management of Agricultural Water Use (National Guidelines), intended to cope with these challenges, was released by the Department of Agriculture in July 2002.<sup>336</sup> In order to cope with the extremely uneven distribution of irrigated land, in terms of the National Guidelines, the Department of Agriculture will launch a smallholder irrigation initiative across the country. An example of the broad range of projects envisaged by the National Guidelines is the redistribution of land already serviced by irrigation schemes.<sup>337</sup>

#### **5.2.2.2 AGRO-PROCESSING TECHNOLOGIES PROJECT**

This Project of the Department of Science and Technology aims to transfer technologies and build upon indigenous knowledge in relation to agricultural development.<sup>338</sup> In so doing the Project aims to improve agricultural skills, reduce poverty, create sustainable employment and promote co-operation between the government, educational institutions and the private sector.<sup>339</sup> Establishing partnerships between the state, industry and educational bodies also has the potential to release more resources and investment opportunities for agricultural development.

#### **5.2.2.3 AGRICULTURAL STARTER PACK PROGRAMME**

Because of its link with the National Food Emergency Scheme, the Agricultural Starter Pack Programme of the Department of Agriculture will be discussed later in this Chapter.

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<sup>335</sup> South African Human Rights Commission *The Right to Food* Fifth Economic and Social Rights Report Series, 2002/2003 (2004) 13.

<sup>336</sup> The National Guidelines as a whole can be viewed at ([www.nda.agric.za/docs/Foodsecurity/FinalIFSS](http://www.nda.agric.za/docs/Foodsecurity/FinalIFSS)) (accessed on 25 February 2006).

<sup>337</sup> South African Human Rights Commission *The Right to Food* Fifth Economic and Social Rights Report Series, 2002/2003 (2004) 15.

<sup>338</sup> Kallman *Knowing and Claiming Your Right to Food* 12.

<sup>339</sup> *Ibid.*

#### **5.2.2.4 LANDCARE PROGRAMME**

The LandCare Programme supports the development of infrastructure and facilities for productive and sustainable land use.<sup>340</sup>

This Department of Agriculture programme provides funding for community-based projects such as the creation of community gardens to grow crops and the construction of small dams.<sup>341</sup> This programme has the dual aim of creating employment and improving food security. The LandCare Programme takes an integrated approach to sustainable use and management of agricultural resources, with a focus on areas of water shortage as well as areas previously harmed by poor farming practices.<sup>342</sup> The ravages of poor farming practices, such as over-grazing, deforestation and a lack of contour ploughing, are especially evident in the former homelands of South Africa. It is submitted that scientifically-based projects, like LandCare, are most needed in these areas.

Along similar lines to parts of the LandCare Programme, separate so-called Food Security Projects have been set up at local health clinics to establish food gardens. The households involved in the cultivation are the first to benefit from the food gardens in terms of personal use or sale of the food grown.<sup>343</sup>

#### **5.2.3 INTEGRATED FOOD SECURITY AND NUTRITION PROGRAMME (IFSND)**

The IFSND builds upon the foundations of the aforementioned IFSS. According to the Department of Agriculture and Land Affairs, the IFSND has certain key focus areas.<sup>344</sup> The focus areas which relate most directly to the right to food will be briefly discussed in turn.

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<sup>340</sup> South African Human Rights Commission *The Right to Food* Fifth Economic and Social Rights Report Series, 2002/2003 (2004) 37.

<sup>341</sup> Kallman *Knowing and Claiming Your Right to Food* 9.

<sup>342</sup> South African Human Rights Commission *The Right to Food* Fifth Economic and Social Rights Report Series, 2002/2003 (2004) 37.

<sup>343</sup> Kallman *Knowing and Claiming Your Right to Food* 10.

<sup>344</sup> South African Human Rights Commission *The Right to Food* Fifth Economic and Social Rights Report Series, 2002/2003 (2004) 15.

### 5.2.3.1 SOCIAL SECURITY NETS AND FOOD EMERGENCY MEASURES

This is a special relief package provided to counter dramatically increased food prices experienced in South Africa from late 2001 until 2003. This money was allocated to relief efforts of the World Food Programme as well as to distribute food parcels to needy households. A sub-programme of the IFSNP called the National Food Emergency Scheme (NFES) was introduced at a similar time by the National Department of Social Development. Needy families receive food parcels as part of the NFES.<sup>345</sup> An off-shoot of the NFES is the Agricultural Starter Pack Programme (ASPP). Those who qualify for NFES food parcels also qualify to apply for a food security package from the Department of Agriculture in terms of the ASPP. The “starter pack” consists of seeds and gardening equipment or chickens. Those who qualify for the NFES are also eligible for the ASPP if they show an interest in agriculture and have land and water available for the purpose.<sup>346</sup> The NFES is intended to work hand in hand with the ASPP or an accessible public works programme in the sense that the NFES food packages are intended to provide three months’ worth of food until the recipients are able to produce food through the ASPP or a public works programme.<sup>347</sup> The particular social assistance grants available through the Department of Social Development will be discussed later in this Chapter.

### 5.2.3.2 INTEGRATED NUTRITION PROGRAMME (INP)

This programme of the National Health Department provides the state’s overall policy framework for improving nutrition in South Africa.<sup>348</sup> In other words, the INP focuses on the quality of food consumed by South Africans with an aim of improving the nutritional status of everyone in South Africa.

The listed strategies of the INP are:<sup>349</sup>

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<sup>345</sup> South African Human Rights Commission *The Right to Food* Fifth Economic and Social Rights Report Series, 2002/2003 (2004) 16.

<sup>346</sup> Kallman *Knowing and Claiming Your Right to Food* 8.

<sup>347</sup> Kallman *Knowing and Claiming Your Right to Food* 8 and 12.

<sup>348</sup> South African Human Rights Commission *The Right to Food* Fifth Economic and Social Rights Report Series, 2002/2003 (2004) 27.

<sup>349</sup> *Ibid.*

- i) Using good nutrition as a means to counter the effects of disease. Such programmes would, it is submitted, need to include information campaigns so that such knowledge becomes widespread. The Health Department has provided nutritional guidelines for those living with TB, HIV/Aids and other chronic diseases.<sup>350</sup> The INP provides nutritional supplements for those living with HIV/ Aids and/ or TB.<sup>351</sup>
- ii) Growth monitoring and promotion. This is likely to be most applicable to infants whose growth can be monitored at state clinics. The INP aims to improve mother and child nutrition through the provision of Vitamin A supplements to mothers and their babies and young children and other nutrition interventions at state health facilities to counter child malnutrition.<sup>352</sup>
- iii) Promoting nutrition generally and specifically micronutrient nutrition. Once again the policy is not clear as to the meaning of this strategy, but its focus appears to be to encourage South Africans to consume more nutritious foods. In relation to micronutrient nutrition, government promotion and regulation of fortified foods, such as bread, is likely to be envisaged.
- iv) Improved food service management standards. This pertains to the provision of nutritious food to those in state institutions, like hospitals.<sup>353</sup>
- v) Promotion of breastfeeding. This strategy is self-evident. The nutritional benefits of babies being fed with breast milk as opposed to bottled milk is well known. In food insecure families, where the availability of bottled milk is likely to be a problem, breastfeeding is even more desirable. However, where breastfeeding can open the child up to other health risks (such as contracting HIV from an HIV-positive mother), these dangers need to be brought to the attention of the mother or other care-giver, and suitable alternatives made available to them.<sup>354</sup>

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<sup>350</sup> National Department of Health, *South African National Guidelines on Nutrition for People Living with TB, HIV/Aids and other chronic debilitating conditions* (2001) accessed at <http://www.doh.gov.za/aids/index.html> on 5 July 2006.

<sup>351</sup> Kallman *Knowing and Claiming Your Right to Food* 10.

<sup>352</sup> *Ibid.*

<sup>353</sup> South African Human Rights Commission *The Right to Food* Fifth Economic and Social Rights Report Series, 2002/2003 (2004) 28.

<sup>354</sup> *Ibid.*

- vi) Contribution to household food security. This is likely to entail food packages and other state aid to those in urgent need of food.

A critical part of the INP is the Primary School Nutrition Programme to which about 86% of state monetary allocation to the INP is currently spent.<sup>355</sup>

### **5.2.3.3 SCHOOL NUTRITION PROGRAMMES**

The Primary School Nutrition Programme was initially run by the National Health Department. The Programme was taken over by the Education Department in April 2004<sup>356</sup> when it was given the new name of the National School Nutrition Programme.<sup>357</sup> Due to the close similarity between the two school feeding programmes, they will not be separately discussed in this dissertation. The feeding programme involves the provision of learners from Grade R to Grade 7 in particular identified poverty-stricken areas with a standardised nutritious meal at school.<sup>358</sup>

A separate feeding scheme for learners in crèches, known as the Community-Based Nutrition Programme, is run by the Gauteng Health Department.<sup>359</sup> There have been no reports of this Programme being extended to other provinces.

## **5.3 NATIONAL LEGISLATION IN PLACE OR BEING DRAFTED**

There is no overall piece of legislation covering the right to food.<sup>360</sup> Legislative intervention to cope with the right to food issue in South Africa has, to date, been fragmented. Khoza

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<sup>355</sup> *Ibid.*

<sup>356</sup> As of December 2004, schools benefiting under the scheme are allocated 80 cents per learner per day.

<sup>357</sup> South African Human Rights Commission *The Right to Food* Fifth Economic and Social Rights Report Series, 2002/2003 (2004) 28.

<sup>358</sup> South African Human Rights Commission *The Right to Food* Fifth Economic and Social Rights Report Series, 2002/2003 (2004) 3 and 28.

<sup>359</sup> South African Human Rights Commission *The Right to Food* Fifth Economic and Social Rights Report Series, 2002/2003 (2004) 31.

<sup>360</sup> Khoza "Realising the Right to Food in South Africa: Not by Policy Alone- A Need for Framework Legislation" 678.

notes that various pieces of sectoral legislation relating in some way to the right to food have been passed.<sup>361</sup>

### 5.3.1 NATIONAL FOOD SECURITY DRAFT BILL (NFSDB)

According to Khoza the NFSDB is an attempt by the South African government to meet its constitutional and international law obligations to take reasonable legislative measures to achieve the right to food.<sup>362</sup> According to the SAHRC, the NFSDB aims to achieve better integration of affected and responsible government departments by:

- all the relevant departments reporting on their food security related activities to a central department (probably the Department of Agriculture and Land Affairs); and
- creating a system for food security project proposals, evaluation and disbursement.<sup>363</sup>

The NFSDB's preamble outlines its aims in more detail. These aims include ensuring accessibility and use of safe, nutritious and quality food which is necessary for dignified existence.<sup>364</sup> The NFSDB also aims to provide financial and institutional means for maintaining availability, accessibility and distribution of sufficient food for all, including emergency food measures and to promote sustainable access to land, food production and natural resource conservation. In relation to governance and administration of the programme, honest and responsible food trading systems and the promotion of co-operation between government departments and spheres is sought.<sup>365</sup>

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<sup>361</sup> Khoza "Realising the Right to Food in South Africa: Not by Policy Alone- A Need for Framework Legislation" 664.

<sup>362</sup> Khoza "Realising the Right to Food in South Africa: Not by Policy Alone- A Need for Framework Legislation" 682.

<sup>363</sup> South African Human Rights Commission *The Right to Food* Fifth Economic and Social Rights Report Series, 2002/2003 (2004) 25.

<sup>364</sup> The NFSDB accessed on the South African Government Website. Accessed at [www.gov.za](http://www.gov.za) on 8 May 2006.

<sup>365</sup> South African Government Website. Accessed at [www.gov.za](http://www.gov.za) accessed 8 May 2006.

## 5.4 ANALYSIS OF EXISTING PROGRAMMES AND LEGISLATION AND PARTICULARLY THEIR IMPLEMENTATION

### 5.4.1 GENERALLY

Khoza argues that existing South African food policies and laws do not seem to properly protect the right to food.<sup>366</sup> The widespread food insecurity, hunger and malnutrition cited in the introductory chapter of this dissertation support this view. Brand adopts a three-pronged analysis for considering whether the state's existing approach to food is constitutionally sound.<sup>367</sup> The three aspects he cites are all requirements of the state's duty to fulfil the right to food, as discussed in Chapter 3 of this dissertation. Brand attempts to establish:<sup>368</sup>

- i) whether the state has in place a national strategy to meet the right to food;
- ii) whether this strategy is reasonable; and
- iii) whether the state is succeeding in ensuring that the right to food is being progressively realised.

During the course of my analysis of existing state food programmes and legislation and their implementation, I will attempt to include a consideration of what can be termed Brand's barometers of state fulfilment or failure to fulfil the right to food. The question of the reasonableness of state action will be considered again in the next Chapter when the tests laid down by our courts for the reasonableness of state fulfilment of socio-economic rights in key constitutional decisions will be analysed.

The SAHRC's 2004 *Right to Food* report recommends the need for greater public awareness of malnutrition, provincial roll-out of the Integrated Food Security Strategy, better food safety, better regulation of the food industry through state buying and faster agricultural land reform.<sup>369</sup> The *Right to Food* report could not say whether there had been progressive

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<sup>366</sup> Khoza "Realising the Right to Food in South Africa: Not by Policy Alone- A Need for Framework Legislation" 678.

<sup>367</sup> Brand "The Right to Food" in Brand and Heyns (eds) *Socio-Economic Rights in South Africa* 180.

<sup>368</sup> *Ibid.*

<sup>369</sup> South African Human Rights Commission *The Right to Food* Fifth Economic and Social Rights Report Series, 2002/2003 (2004) xix.



realisation of the right to food during the 2002/2003 report period. It did acknowledge that many people, especially children, were denied the right to food due to high prices or poor government plans.<sup>370</sup>

The shortcomings of the government's food policy generally are highlighted by Khoza who argues that until the formulation of the IFSS (evaluated below), government policy relating to the right to food was fragmented and poorly co-ordinated and implemented.<sup>371</sup> He argues further that the situation is aggravated by a lack of effective communication between the numerous government departments who have a role to play in realising the right to food.<sup>372</sup> In gauging whether the state has a national strategy to tackle the food challenge Brand also distinguishes between the position before and after the formulation of the IFSS. Brand notes that before the IFSS there was in effect no strategy at a national level dealing with food, but this constitutional shortcoming has largely been remedied by the IFSS.<sup>373</sup> Similarly, according to Engh, right to food policies are hard to gauge because they transcend a number of sectors and government departments<sup>374</sup>. Hopefully the IFSS will provide a more co-ordinated, organised and better implemented national policy. Furthermore, it would make sense for one government department to take clear overall responsibility for implementation of government policies and for that department to ensure that the supporting departments meet regularly with it and each other to ensure a better co-ordinated response to the food challenge.

Khoza notes that most of government's attempts to fight food insecurity, hunger and malnutrition have been by way of policy measures.<sup>375</sup> It is submitted that the very fact that the main government response to the food issue in South Africa has been by way of policy as opposed to legislation is an indication that government needs to be doing more to guarantee the right to food. Policy, by its very nature, is a planning mechanism and the need for implementation of policy has already been highlighted in this research as being critically

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<sup>370</sup> South African Human Rights Commission *The Right to Food* Fifth Economic and Social Rights Report Series, 2002/2003 (2004) 5. The Report did put forward the opinion that the State was meeting its difficult burden reasonably well in the circumstances. *Ibid.*

<sup>371</sup> *Ibid.*

<sup>372</sup> *Ibid.* The Departments concerned are, Agriculture and Land Affairs, Health, Social Development, Public Works, Finance and Education and Trade.

<sup>373</sup> Brand "The Right to Food" in Brand and Heyns (eds) *Socio-Economic Rights in South Africa* 180.

<sup>374</sup> Engh "Developing Capacity to Realise Socio-Economic Rights. The Example of HIV/Aids and the Right to Food in South Africa" 5.

<sup>375</sup> *Ibid.*

needed. It is submitted that government's response to realising the right to food must be based first and foremost on legislation.

It has sensibly been suggested that government should co-operate with non-government organisations committed to realising the right to food.<sup>376</sup> The fact that input from non-governmental organizations (NGO's) has not been sufficiently utilised or sought is reflected in the SAHRC noting a lack of inclusive participation in the formulation of comprehensive food legislation.<sup>377</sup> Government tapping into the expertise and assistance of qualified NGO's to assist in realising the right to food makes sense for various reasons. Unlike government departments, which have a far wider scope of concern, many NGO's are particularly focused on certain social needs, such as the right to food. The collective experience of NGO's is, therefore, likely to be invaluable to government. It is also probable that the assistance of NGO's might well be available at minimal or no cost to the state due to external funding of many non-governmental organisations. This is not to say that the government may or should negate its obligations and leave everything to NGO's, but rather that meaningful co-operation between state and non-state actors is likely to make the realisation of the right to food a more attainable task.

In considering whether the national food strategy currently in place is reasonable Brand acknowledges the strides made through the IFSS in providing a co-ordinated approach to obtaining food security.<sup>378</sup> He acknowledges state programmes which “facilitate” access to food such as land distribution and “provide” access to food such as school feeding.<sup>379</sup> However, Brand pertinently notes that existing state food policy fails to be reasonable in that it does not make provision for certain persons in what he terms a “food crisis”.<sup>380</sup> Put another way, someone who does not qualify for a government grant or is not fed at school is generally not provided for in government food policy.<sup>381</sup> Such desperate individuals are left to fend for themselves. The statistics given in Chapter 1 of this dissertation indicate that the

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<sup>376</sup> This decision and recommendation was made at a national food security workshop held in the Limpopo Province in June 2002. Khoza “Workshop on the Right to Food Security” 23.

<sup>377</sup> South African Human Rights Commission *The Right to Social Assistance* Fifth Economic and Social Rights Report Series, 2002/2003 (2004) 26.

<sup>378</sup> Brand “The Right to Food” in Brand and Heyns (eds) *Socio-Economic Rights in South Africa* 182. A separate analysis of the IFSS is made in this Chapter.

<sup>379</sup> Brand “The Right to Food” in Brand and Heyns (eds) *Socio-Economic Rights in South Africa* 182 to 183.

<sup>380</sup> *Ibid.*

<sup>381</sup> The very limited exception provided by the limited Social Relief of Distress Grant, is discussed below.

problem of hunger and malnutrition remains widespread. Therefore clearly the existing social assistance net (discussed later in this Chapter) is not doing enough to ensure that many South Africans are not forced to suffer from hunger and malnutrition. Consequently this lacuna in existing South African state food policy cannot be considered constitutionally reasonable.

Brand questions whether existing state policy can be termed reasonable in light of implementation problems. He cites limited uptake of social assistance grants and the small number of people who are benefiting from state-aided food provision as a basis for this submission.<sup>382</sup> These valid criticisms are considered below when related social assistance provision as a means to counter hunger and malnutrition are considered. However, at this stage it can be noted that any policy which fails to have a meaningful impact in achieving its desired aims cannot be said to be reasonable.

Notwithstanding the aforementioned shortcomings in the implementation of government food policy, there are a number of areas in which it is submitted the state is meeting aspects of its obligations in terms of the Constitution. In the evaluation of particular policies, which follows, both the positive and negative aspects will be highlighted.

## **5.4.2 EVALUATION OF PARTICULAR GOVERNMENT FOOD POLICIES**

### **5.4.2.1 GENERALLY**

The aforementioned policies and programmes can be regarded as indirect social security measures aimed at ensuring access to sufficient and adequate food and nutrition.<sup>383</sup> However, the SAHRC could not say whether on the whole there had been progressive realisation of the right to food during the reporting period.<sup>384</sup> An assessment needs to be made of government's progress in realising the right to food in light of the constitutional duties placed on it in this regard.

It is submitted that the mere creation of state policies covering various aspects of the right to food and food security is a positive move. The formulation of such policies evidences an

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<sup>382</sup> Brand "The Right to Food" in Brand and Heyns (eds) *Socio-Economic Rights in South Africa* 186. The issue of possible retrogression of state policy is considered in relation to land distribution below.

<sup>383</sup> Olivier; Smit and Kalula *Social Security: A Legal Analysis* 546.

<sup>384</sup> South African Human Rights Commission *The Right to Food* Fifth Economic and Social Rights Report Series, 2002/2003 (2004) 5.

awareness of the multi-faceted nature of South Africa's right to food challenges. There has also been some backing up of government policy with state expenditure. In this regard the South African Human Rights Commission reports that the 2002/2003 year saw more government spending on poverty reduction and vulnerability than ever before.<sup>385</sup>

The SAHRC's latest report found that existing state policies respected the right to food by taking cognizance of the food resources of individuals and their ability to meet their own food requirements through their knowledge, skills and actions.<sup>386</sup> It is submitted that this finding of the South African Human Rights Commission is a fair one in so far as it relates to those in society with the ability to feed themselves. However, the statistics shown in Chapter 1 indicate unequivocally that hunger and malnutrition remain a fact of life for many South Africans. It is the state's inadequate response to assisting those facing the greatest food insecurity and hunger which is the main problem. By way of example, the SAHRC itself noted during the 2002/ 2003 reporting period that very high maize prices were passed onto the poor for an extended period.<sup>387</sup> These high maize prices were experienced despite the establishment of a public-private partnership called "Yiyo Lena" to provide discounted maize.<sup>388</sup> It is submitted that unaffordably high prices for staple foods, like maize, raises the very real possibility of sufficient food being denied to certain sectors of the population.<sup>389</sup>

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<sup>385</sup> South African Human Rights Commission *The Right to Food* Fifth Economic and Social Rights Report Series, 2002/2003 (2004) xi.

<sup>386</sup> South African Human Rights Commission *The Right to Food* Fifth Economic and Social Rights Report Series, 2002/2003 (2004) 1.

<sup>387</sup> South African Human Rights Commission *The Right to Food* Fifth Economic and Social Rights Report Series, 2002/2003 (2004) xviii and 17 to 18.

<sup>388</sup> South African Human Rights Commission *The Right to Food* Fifth Economic and Social Rights Report Series, 2002/2003 (2004) 17 to 18. The SAHRC put forward many possible reasons for the failure of the "Yiyo Lena" programme to make maize more affordable. These reasons included that the programme was limited in scope to a tiny percentage of the maize processed for people to eat and that the discounted brand was snapped up as soon as it was put on the shelves. *Ibid.* The snapping up of discounted maize indicates possible opportunistic buying. It may well have been that rather than easing the burden of the most needy, the programme instead served to line the pockets of an opportunistic few.

<sup>389</sup> This submission is supported by the SAHRC's finding that many people had their right to food violated during the 2002/2003 reporting period due to unaffordable food due to high prices. South African Human Rights Commission *The Right to Food* Fifth Economic and Social Rights Report Series, 2002/2003 (2004) 3. The same Report noted a marked increase during 2002/2003 in costs of goods bought by poor. South African Human Rights Commission *The Right to Food* Fifth Economic and Social Rights Report Series, 2002/2003 (2004) xi.

#### 5.4.2.2 INTEGRATED FOOD SECURITY STRATEGY FOR SOUTH AFRICA (IFSS)

The very fact that the IFSS is a comprehensive interdepartmental policy is an improvement from its piecemeal predecessors. The South African Human Rights Commission<sup>390</sup> has described the IFSS as the most coherent policy on food security by any South African government department.<sup>391</sup> Similarly, Khoza describes the IFSS as South Africa's most complete interdepartmental policy on food security.<sup>392</sup> The espoused aims of both the IFSS and the Integrated Food Security and Nutrition Programme (discussed further below) were said by the SAHRC to promote short-, medium and long-term state actions which amount to progressive realization of the right to food.<sup>393</sup> It is significant, however, that the SAHRC did not indicate that these policies actually led to a fulfilment of the right to food. It must be remembered that to realise the right to food in section 27(1)(b), section 7(2) requires that the right be respected, protected, promoted and fulfilled. If any of these aspects are lacking, then the right cannot be said to be being realised.

Khoza believes that the IFSS lacks both the necessary focus on implementation to meet its aims and the legal mechanisms to protect the right to food.<sup>394</sup> The IFSS is a broadly stated policy requiring specific guidelines for what it aims to achieve, how its achievements are to be assessed, and perhaps most significantly, the means of implementation. Significantly, commenting on the IFSS, the South African Human Rights Commission has noted that it is not clear what measures will be put into place to realise the right to food and meet the needs of vulnerable groups.<sup>395</sup> Cabinet's precursor for acceptance of the IFSS, namely the putting into place mechanisms capable of implementing IFSS strategy, has not yet occurred.<sup>396</sup> A proposal to create framework legislation governing the right to food, discussed later in this

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<sup>390</sup> South African Human Rights Commission *The Right to Food* Fifth Economic and Social Rights Report Series, 2002/2003 (2004) 11.

<sup>391</sup> Similarly, Kallman believes that the IFSS has few concrete implementation plans. Kallman *Knowing and Claiming Your Right to Food* 14.

<sup>392</sup> Khoza "Realising the Right to Food in South Africa: Not by Policy Alone- A Need for Framework Legislation" 681.

<sup>393</sup> South African Human Rights Commission *The Right to Food* Fifth Economic and Social Rights Report Series, 2002/2003 (2004) 2.

<sup>394</sup> Khoza "Realising the Right to Food in South Africa: Not by Policy Alone- A Need for Framework Legislation" 681.

<sup>395</sup> South African Human Rights Commission *The Right to Food* Fifth Economic and Social Rights Report Series, 2002/2003 (2004) 12.

<sup>396</sup> Khoza "Realising the Right to Food in South Africa: Not by Policy Alone- A Need for Framework Legislation" 681.

Chapter, is quite possibly the best solution in this regard. An indication of the extent of work still required is the Department of Agriculture noting that the IFSS itself has yet to be finalised.<sup>397</sup> It is logical that until a strategy itself has been finalised there is little prospect of proper implementation thereof.

The problem of non-implementation of policy is aggravated (and perhaps caused) by a lack of institutional capacity, particularly in rural areas.<sup>398</sup> This is a major indictment on government's response to the food problem in South Africa: simply putting in place reasonable policies (like the IFSS) without coming up with ways of turning policy into tangible implementation is not meeting the right to food as contained in the Constitution. This submission is backed up by the *Grootboom* judgment's test of reasonable government policy which states that a reasonable policy must be reasonable in conception and implementation.<sup>399</sup>

It would therefore seem as though the IFSS, although a big improvement on earlier government policy, has yet to produce the intended realisation of the right to food. It would appear, however, to lay a solid foundation upon which implementation strategies and legislation can build. But these comments stem from the fact that the Integrated Food Security Strategy is, as its name suggests, a strategy and not an alternative to legislation or other means to translate policy into tangible results.

### 5.4.2.3 AGRICULTURAL PROGRAMMES

An analysis of the implementation of these programmes reveals areas of strengths and weaknesses. The SAHRC reports that there was some sign of improvement in certain areas through the state's support of agricultural production for emerging farmers who were often the beneficiaries of land redistribution programmes.<sup>400</sup> It also indicated that agricultural production support was also made generally available through national and provincial

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<sup>397</sup> Department of Agriculture, Republic of South Africa *The Integrated Food Security Strategy for South Africa* 37.

<sup>398</sup> South African Human Rights Commission *The Right to Food* Fifth Economic and Social Rights Report Series, 2002/2003 (2004) 12.

<sup>399</sup> *Supra*. See Chapter 6 wherein this decision of the Constitutional Court is comprehensively considered.

<sup>400</sup> South African Human Rights Commission *The Right to Food* Fifth Economic and Social Rights Report Series, 2002/2003 (2004) xviii.

agricultural departments.<sup>401</sup> Arguably, this agricultural support served to fulfil parts of the state's right to food duties. On the down side, however, major operational shortcomings of provincial agricultural departments have been evident which has meant that much food production support has been lacking.<sup>402</sup>

The SAHRC indicates that the National Guidelines for Integrated Management of Agricultural Water Use support traditional African production techniques as they promote household food security.<sup>403</sup> In this way the National Guidelines can be said to be successfully promoting the right to food.

The Agricultural Department of the North-West Province has indicated that the provision of agricultural infrastructure, such as the provision of adequate farming equipment, is lagging way behind agricultural training initiatives.<sup>404</sup> Such infrastructural shortages need to be met as having the requisite training to produce food is wasted without the physical means to do so.

According to the Agricultural Research Council (ARC):

“research and technology programmes make a very significant impact to optimise food production”<sup>405</sup>

The ARC listed examples, during the last SAHRC reporting period, of technology transfer projects and agricultural training which have helped vulnerable groups to produce and process food.<sup>406</sup> Such interventions, driven by government's agricultural policies, are a positive trend which should be expanded upon to promote better food production.

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<sup>401</sup> South African Human Rights Commission *The Right to Food* Fifth Economic and Social Rights Report Series, 2002/2003 (2004) 4.

<sup>402</sup> South African Human Rights Commission *The Right to Food* Fifth Economic and Social Rights Report Series, 2002/2003 (2004) xviii.

<sup>403</sup> South African Human Rights Commission *The Right to Food* Fifth Economic and Social Rights Report Series, 2002/2003 (2004) 2.

<sup>404</sup> South African Human Rights Commission *The Right to Food* Fifth Economic and Social Rights Report Series, 2002/2003 (2004) 4.

<sup>405</sup> Quoted in South African Human Rights Commission *The Right to Food* Fifth Economic and Social Rights Report Series, 2002/2003 (2004) 36.

<sup>406</sup> South African Human Rights Commission *The Right to Food* Fifth Economic and Social Rights Report Series, 2002/2003 (2004) 36 to 37.

The Land Care Programme has been successful in countering soil erosion in a number of areas, which is necessary to increase agricultural productivity. During the latest SAHRC report period, the Department of Agriculture noted that approximately 140 key soil conservation projects had been completed.<sup>407</sup> Although there are no statistics yet available to back up the submission, reduced soil erosion with resultant improved agricultural productivity is a positive development in terms of improving food security.

#### **5.4.2.4 INTEGRATED FOOD SECURITY AND NUTRITION PROGRAMME (IFSND)**

The Department of Social Development's National Food Emergency Scheme (NFES), a branch of the IFSND, lacked support from Seed and Plant programme of the Department of Agriculture and public works programmes.<sup>408</sup> As has already been argued, such problems call for a more co-ordinated government response as well better co-operation between government departments. Emergency feeding programmes should also be conducted hand in hand with longer-term measures to empower people to feed themselves. This submission is made on the basis that without the longer term results being considered, the beneficiaries of food aid may become reliant on the aid and can be even more vulnerable to hunger and malnutrition than before receiving the aid. The way in which the state's National Food Emergency Scheme is intended to work hand in hand with the Agricultural Starter Pack Programme or an accessible public works programme (discussed earlier in this Chapter) is an example of successful intended co-ordination of programmes. However, Khoza argues that in practice the National Food Emergency Scheme has been rolled out without these supporting programmes being in place. As a result, the households which received food parcels have been left in vulnerable positions.<sup>409</sup> A further question mark against the National Food Emergency Scheme comes from Mr Nick De Villiers of the South African Legal Aid Board who indicates that as of 2006 the Scheme in effect has been abandoned.<sup>410</sup> Clearly any scheme which exists in theory only, in no way assists in realising the right to food.

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<sup>407</sup> Cited in South African Human Rights Commission *The Right to Food* Fifth Economic and Social Rights Report Series, 2002/2003 (2004) 38.

<sup>408</sup> Khoza "Realising the Right to Food in South Africa: Not by Policy Alone- A Need for Framework Legislation" 678-679.

<sup>409</sup> Khoza "Realising the Right to Food in South Africa: Not by Policy Alone- A Need for Framework Legislation" 679- 680.

<sup>410</sup> Mr De Villiers was an attorney representing applicants in the case of *Kutumela v Member of the Executive Committee for Social Services, Culture, Arts and Sport in the North West Province*, 671/2003 Bophutatswana Provincial Division, discussed later in this dissertation. (Source: Personal correspondence



On the positive side, the South African Human Rights Commission reports that in 2002/2003 the State's obligation to fulfil the right to food was effected mainly through social grants and the National Food Emergency Scheme. The Commission noted that 230 million rand was spent on NFES during the 2002/2003 report period.<sup>411</sup> This substantial state expenditure on emergency food aid was meeting some of the food needs of vulnerable groups. Such state spending to reduce the plight of vulnerable groups is in accordance with the Constitutional Court's interpretation of reasonable State policy in the *Grootboom* case.<sup>412</sup> However, the fact that the SAHRC provides such a broad estimated range of number of households who benefited from the NFES (between 60089 and 149779)<sup>413</sup> indicates a lack of the requisite information to properly implement the Scheme.

#### 5.4.2.5 INTEGRATED NUTRITION PROGRAMME

It has already been stated that an aim of this Programmes is to monitor the extent of malnutrition of children treated in public healthcare facilities. The SAHRC notes that this monitoring has not been taking place comprehensively for a number of years.<sup>414</sup> Comprehensive monitoring is clearly needed to accurately gauge the extent of the child malnutrition in South Africa. It is submitted that such comprehensive monitoring is both called for and not an overly difficult task in that it can be done at the same time as children are brought into public health care facilities by their guardians for inoculations or any medical treatment.

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between the author and Mr De Villiers, attorney for the applicants, on 6 July 2006.) Whether this personal opinion, albeit of someone closely involved with food law and policy in South Africa, is borne out by data and authoritative reports to back it up remains to be seen.

<sup>411</sup> South African Human Rights Commission *The Right to Food* Fifth Economic and Social Rights Report Series, 2002/2003 (2004) 3. The same report noted that between 60089 and 149779 households received food parcels as part of the National Food Emergency Scheme in the 2002/2003 reporting period. South African Human Rights Commission *The Right to Food* Fifth Economic and Social Rights Report Series, 2002/2003 (2004) xvii.

<sup>412</sup> *Supra*.

<sup>413</sup> South African Human Rights Commission *The Right to Food* Fifth Economic and Social Rights Report Series, 2002/2003 (2004) xvii.

<sup>414</sup> South African Human Rights Commission *The Right to Food* Fifth Economic and Social Rights Report Series, 2002/2003 (2004) 31.

#### 5.4.2.6 PRIMARY SCHOOL NUTRITION PROGRAMME AND NATIONAL SCHOOL NUTRITION PROGRAMME

These programmes have been criticised for taking an over-simplified approach to which schools are provided with food. The criteria used focuses only on the previously disadvantaged status of a school, rather than on particular needs and socio-economic circumstances.<sup>415</sup> To elaborate, it is quite possible that in an area where all learners were well fed at one time, at a later date there may be certain learners who now lack such sufficient and adequate food. Due to changing circumstances, clearly such a system will mean that certain learners in need of food at school will therefore not be fed and their ability to learn will undoubtedly suffer as a result. It is submitted that additional methods must be implemented to ensure that hungry and malnourished learners at schools not otherwise covered by school feeding schemes are provided for. Notwithstanding these criticisms of the school feeding programmes, the SAHRC rightly indicates that these programmes are going some way towards fulfilling the constitutional right to food.<sup>416</sup>

It has been argued that the primary school feeding programme is a good means of alleviating poverty amongst the selected pupils, but that the programme falls short in that learners are only fed during school days.<sup>417</sup> This would seem to be a harsh criticism of the programme in that a key reason for the school feeding programme is to provide an environment which is conducive to learning through ensuring that the learners are not hungry. As these authors themselves note, a lack of food has adverse results for mental and physical health and productivity.<sup>418</sup>

The SAHRC's Right to Food Report found three parts of the Primary School Nutrition Programme to be unreasonable. Firstly, the Report indicated that too little money was allocated for the cost of feeding each learner. This figure showed a dramatic decrease to 67 cents per learner per day in the 2002/2003 reporting period, down from a range of between

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<sup>415</sup> Khoza "Realising the Right to Food in South Africa: Not by Policy Alone- A Need for Framework Legislation" 679.

<sup>416</sup> South African Human Rights Commission *The Right to Food* Fifth Economic and Social Rights Report Series, 2002/2003 (2004) 3.

<sup>417</sup> Olivier; Smit and Kalula *Social Security: A Legal Analysis* 546.

<sup>418</sup> *Ibid.*

99cents and R2.10 per learner per day in 2001/2002.<sup>419</sup> Whilst this research is not the appropriate place to argue as to how much needs to be spent on feeding each learner per day, such a notable decrease in the amount spent, notwithstanding that a moderate increase could be expected in line with inflation, is cause for concern. Secondly, the Report noted that 151615 fewer learners benefited from the scheme in 2002/2003 in comparison to the year before.<sup>420</sup> This reduction in the number of learners fed is a step in the wrong direction and is made worse when one considers the aforementioned criticism of the programme not catering for hungry or malnourished learners at non-designated schools. Thirdly, the Report indicated that during the reporting period there was a period of three months when the programme was not running at all in the Eastern Cape.<sup>421</sup> Clearly, such geographical inequality in service delivery is totally unacceptable. It is perhaps not out of place to draw an analogy here with the TAC case in which provision of anti-retrovirals in only selected public health facilities was found to be unacceptable.<sup>422</sup> In the same way, to deny learners in one province social security benefits received in other provinces is unacceptable.

Notwithstanding the school feeding programmes, the SAHRC reports a shocking statistic that 101152 children in South Africa were hospitalised for severe malnutrition in the SAHRC's 2002/2003 reporting period.<sup>423</sup> In two East Cape hospitals the fatality rate for these children was between 21 and 38%.<sup>424</sup> It could be considered unfair to lay blame for the startling number of malnourished children with the school feeding programme which only operates during term-time and even then only applies to particular primary school learners. However, by allowing such a situation to exist, it is submitted that government is failing to fulfil its section 28(1)(c) obligation to provide all children with basic nutrition.

Another issue requiring closer examination is the fact that the current school feeding scheme does not cover high school learners at all. The Mail and Guardian newspaper reports that there are three million children from the ages of 15 to 18 in need of poverty assistance, 2.5

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<sup>419</sup> South African Human Rights Commission *The Right to Food* Fifth Economic and Social Rights Report Series, 2002/2003 (2004) 3.

<sup>420</sup> *Ibid.*

<sup>421</sup> *Ibid.*

<sup>422</sup> *Supra.* This and other key aspects of the case are discussed in the next Chapter.

<sup>423</sup> South African Human Rights Commission *The Right to Food* Fifth Economic and Social Rights Report Series, 2002/2003 (2004) 3.

<sup>424</sup> *Ibid.*

million of which are living in dire poverty.<sup>425</sup> This report raises the prudent questions of what happens to such hungry high school learners and questions whether they are less deserving of food than their primary school counterparts. The report also notes the high drop-out rate amongst high school learners, often attributable to poverty and a lack of sustenance.<sup>426</sup> Whilst government might argue that it has insufficient resources to fund school feeding at high schools, it should be noted that section 28(1)(c) of the Constitution does not limit the food rights of children to those of a primary school-going age. It is hard to envisage a constitutionally acceptable argument for feeding a hungry or malnourished grade 7 learner and yet not providing the same assistance for such a learner the following year when he or she moves up to grade 8 and the rest of high school to follow. It is therefore highly arguable that government is under an obligation to extend its current programme to high schools.

### 5.4.3 GOVERNMENT LEGISLATION

Khoza notes that there is no single piece of legislation covering the right to food in a holistic manner. He argues that the right to food gets only implicit and ad-hoc protection in laws covering various sectors including agriculture, land, water, public works, social welfare and health care.<sup>427</sup> A national food security workshop held in the Limpopo Province in June 2002 decided and recommended that the proposed National Food Security Bill is an important step towards realising the right to sufficient food.<sup>428</sup> This recommendation appears a valid one in light of the lack of co-ordinated national legislation dealing with the right to food. This recommendation accords with Khoza's call for a comprehensive piece of legislation specifically dealing with the right to food.<sup>429</sup> A lack of existing co-ordinated legislation is a likely cause of the South African Human Rights Commission noting that protection of the right to food is not as good as it could or should be.<sup>430</sup> It is therefore submitted that the passing of this legislation, after adequate consultation with all relevant stakeholders, should

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<sup>425</sup> Mail and Guardian (2006/02/07) *Food for Thought* www.mg.co.za (Accessed on 1 September 2006)

<sup>426</sup> The report notes that in 2003 there was a 44.8% under-enrollment of grade 12 learners. *Ibid.*

<sup>427</sup> Khoza "Realising the Right to Food in South Africa: Not by Policy Alone- A Need for Framework Legislation" 678.

<sup>428</sup> Khoza "Workshop on the Right to Food Security" 23. This workshop also called for further integration between government departments responsible for meeting the right to food and for co-operation between these departments and non-government actors. *Ibid.*

<sup>429</sup> Khoza "Realising the Right to Food in South Africa: Not by Policy Alone- A Need for Framework Legislation" 673.

<sup>430</sup> South African Human Rights Commission *The Right to Social Assistance* Fifth Economic and Social Rights Report Series, 2002/2003 (2004) 57.

be prioritised by government. It is therefore not surprising that Khoza identifies as a positive aspect of NFSDB that it, like the IFSS, aims to create co-ordinated food security policies, strategies and programmes including establishing institutions to co-ordinate cross-sectoral co-operation.<sup>431</sup>

However, whilst the previous paragraph notes the chorus of calls for a comprehensive piece of food legislation, a number of problems with the National Food Security Draft Bill have been raised. According to the SAHRC, problems with the NFSDB include a lack of measures to regulate the private sector or to maintain food for disaster relief and/or price stability.<sup>432</sup> In addition the Bill does not guarantee a minimum income for those affected by malnutrition and in relation to project application based facilities, credible organisations to run the projects are not identified.<sup>433</sup> It is submitted that these are very relevant criticisms which need to be ironed out before the NFSDB becomes law. This argument is made on the basis that each criticised aspect relates to necessary aspects of the right to food identified earlier in this research.<sup>434</sup> This research has shown that the private sector is duty-bound to respect the right to food. Disaster relief feeding and price regulation (the latter point being more controversial) have both been proposed as part of the state's right to food obligations. The idea of providing a minimum income which could be used by those affected by malnutrition is discussed later in this Chapter in the context of the Basic Income Grant and the social relief of distress grant. Finally, throughout this research the need for proper implementation of policy, rather than mere rhetoric, has been called for. It is therefore imperative that before the Bill becomes law, credible organisations are identified or created to run the projects created by co-ordinated food legislation.

There are various other laws in the pipeline which show signs of a greater commitment from government to solving food issues and improved prospects for more effectively realising the right to food. Legislative developments in the areas of nutrition, food safety, food trading,

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<sup>431</sup> Khoza "Realising the Right to Food in South Africa: Not by Policy Alone- A Need for Framework Legislation" 682.

<sup>432</sup> South African Human Rights Commission *The Right to Food* Fifth Economic and Social Rights Report Series, 2002/2003 (2004) 25.

<sup>433</sup> South African Human Rights Commission *The Right to Food* Fifth Economic and Social Rights Report Series, 2002/2003 (2004) 25 and 26.

<sup>434</sup> See Chapter 3.

agricultural development and food security are all reportedly underway.<sup>435</sup> Whilst such developments would appear promising, it is premature to become carried away with the possible improvements which might result. It is first necessary to see what laws are formulated, and perhaps even more importantly, what mechanisms are put into place to convert such laws into sufficient food on the plates of hungry and malnourished families.

## **5.5 INTERCONNECTED STATE PROGRAMMES**

Each one of the following programmes has sufficient content to be the subject-matter of a thesis on its own. This Chapter does not therefore intend to analyse these related state programmes in any great detail. The aim of this brief analysis is rather to indicate how these state programmes tie in with realisation (or denial) of the right to food.

### **5.5.1 LAND REDISTRIBUTION**

In earlier Chapters the possible link between realising the right to food and land redistribution in South Africa was raised. If one accepts that having access to land, especially fertile land, has an obvious role to play in realising the right to food and creating food security, then a brief consideration of South Africa's land reform policies would not be out of place. As of 2002 only about 1.2% out of the government's espoused 30% post-apartheid land redistribution had taken place and approximately 80% of prime agricultural land was still owned by white commercial farmers<sup>436</sup>. It has been stated earlier that white South Africans also happen to be the race group with the greatest food security and smallest food shortage. When all these factors are considered as a whole, the legal right to food would appear to be a basis upon which calls for accelerated land redistribution could be made.

It was noted earlier in this Chapter that one aspect of the state's duty to fulfil the right to food is to ensure that state measures to realise the right are progressive and conversely not retrogressive. The problem of land redistribution in South Africa is most clearly illustrated by Brand who highlights that a change in government policy making the qualification criteria for

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<sup>435</sup> Khoza "Realising the Right to Food in South Africa: Not by Policy Alone- A Need for Framework Legislation" 678.

<sup>436</sup> Coomans and Yapko are citing 2002 figures provided by the Department of Land Affairs. Coomans and Yapko "A Framework on the Right to Food- An International and South African Perspective" 29. The same source also indicates that as of 2002 approximately 14 million black South Africans were living in the infertile former homelands. *Ibid.*

land distribution stricter amounts to a retrogressive step which *prima facie* amounts to a denial of the right to food.<sup>437</sup> This submission is in accordance with international law in terms of General Comment 3 of the Committee on ESCR which notes that any purposeful retrogression amounts to a *prima facie* right to food violation, which will be hard to justify.<sup>438</sup> Lahiff notes that the stricter criteria for land distribution cuts out the most needy applicants and in so doing greatly lessens the extent to which that land distribution programme is able to fulfil the right to food.<sup>439</sup>

Despite the above-mentioned major shortcomings, a laudable government programme to ensure that redistributed land is productively used is the Comprehensive Farmer Support Package of the Department of Agriculture. This project aims to comprehensively train those who benefit from land distribution.<sup>440</sup> Although too early to comment as to the effectiveness of its implementation, in theory this policy makes a great deal of sense as providing previously disadvantaged people with land suitable for agriculture is pointless unless they have the skills to productively use the land.

Another promising government initiative is the Land Redistribution for Agricultural Development Programme (LRAD). As the name suggests, LRAD provides land redistribution to previously disadvantaged groups for agricultural use. LRAD provides both land and a contribution towards start-up costs.<sup>441</sup> Beneficiaries are required to contribute some of the start-up costs in cash or in kind.

Whilst land redistribution in South Africa remains a highly emotive issue, especially in light of the experiences in Zimbabwe, in the context of the fight against food insecurity it is submitted that land redistribution has an important role to play.

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<sup>437</sup> Brand “The Right to Food” in Brand and Heyns (eds) *Socio-Economic Rights in South Africa* 188. Here Brand notes that to qualify for a grant under the Land Redistribution for Agricultural Development programme a new requirement of a minimum contribution by the applicant of R5000 towards buying the land.

<sup>438</sup> General Comment 3 at Para 9. Cited in Brand “The Right to Food” in Brand and Heyns (eds) *Socio-Economic Rights in South Africa* 178.

<sup>439</sup> Cited in Brand “The Right to Food” in Brand and Heyns (eds) *Socio-Economic Rights in South Africa* 188.

<sup>440</sup> Kallman *Knowing and Claiming Your Right to Food* 9.

<sup>441</sup> Ministry for Agriculture and Land Affairs: “Land Redistribution for Agricultural Development: A Sub-Programme of the Land Redistribution Programme” accessed at <http://land.pwv.gov.za/redistribution> on 6 July 2006.

## 5.5.2 SOCIAL SECURITY GRANTS IN SOUTH AFRICA

I will consider the various categories of social grants and the social relief of distress grant separately. In both instances the content of the assistance provided will be outlined and suggestions made as to their significance towards realising the right to food.

The Social Assistance Act 13 of 2004<sup>442</sup> and its Regulations provide for various types of social assistance grants. The listed<sup>443</sup> social grants are the:

- (i) child support grant;
- (ii) care dependency grant;
- (iii) foster child grant;
- (iv) disability grant;
- (v) older person's grant;
- (vi) war veteran's grant; and
- (vii) grant-in-aid.

The rest of this section will explain the requirements to qualify for each of these social grants and provide a brief commentary as to how the grants and their implementation could be adapted to increase access to the right to food. All categories of social grants are non-contributory<sup>444</sup> and, with the exception of foster child grants, are only provided upon the successful completion of a means test which ensures that the recipient is in financial need of a social grant.<sup>445</sup>

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<sup>442</sup> Its date of commencement was 1 April 2006 (Proc. R15 in GG 28652 of 31 March 2006).

<sup>443</sup> These social grants are listed in ss 6 to 12 respectively of the Social Assistance Act.

<sup>444</sup> Olivier; Okpaluba; Smit and Thompson (eds) *Social Security Law - General Principles* 87.

<sup>445</sup> There are also various other requirements. The requirements for receipt of a social grant are found in s 5 of the Social Assistance Act. Section 6 of the Act, as read with Regulation 8, provide the prescribed procedures for applying for the various grants. The means test is determined by a formula contained in Regulation 12 which takes cognizance of the income and assets of the grant applicant and his or her spouse.



### **5.5.2.1 CHILD SUPPORT GRANT**

This grant provides support to the primary care-giver of a child.<sup>446</sup> The primary care-giver must be over the age of 16. Significantly, there has been a relatively recent extension of the child support grant to children under the age of 14.<sup>447</sup> Before this extension the grant only applied to children of under 11 years. In terms of the new age threshold, as with the old, to qualify the primary care-giver must pass a means test contained in Regulation 16.

### **5.5.2.2 CARE DEPENDENCY GRANT**

This grant is for the parent, primary care-giver or foster parent of a physically or mentally disabled child in need of permanent care or support services, unless the disabled child has been cared for by a state-funded institution on a full-time basis for at least 6 months.<sup>448</sup>

### **2.5.2.3 FOSTER CHILD GRANT**

This grant is for foster parents, as defined in the Child Care Act 74 of 1983, who qualify for a foster child grant for the time that the foster child needs such care.<sup>449</sup>

### **2.5.2.4 DISABILITY GRANT**

This grant is for physically or mentally disabled people who are unable to support themselves due to their disability.<sup>450</sup>

### **5.5.2.5 OLDER PERSON'S GRANT**

Currently women of 60 years and older and men of 65 years and older, who meet the other requirements of section 5 of the Social Assistance Act, qualify for an older person's grant.<sup>451</sup>

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<sup>446</sup> S 6 of the Social Assistance Act.

<sup>447</sup> This extension of the child care grant was created by Government Notice 460 of 31 March 2003.

<sup>448</sup> S 7 of the Social Assistance Act.

<sup>449</sup> S 8 of the Social Assistance Act.

<sup>450</sup> S 9 of the Social Assistance Act.

Interestingly, the age differential between women and men for payment of these grants is currently the subject of a constitutional challenge by four men in the Transvaal Provincial Division of the High Court. At the time of launching their application these men were all at least 60 years of age, but not yet 65. The applicants live in poverty in Gelvandale, Port Elizabeth.<sup>452</sup>

#### **5.5.2.6 WAR VETERAN'S GRANT**

This grant is for someone who has performed a prescribed form of military service and is 60 years old or more or is unable to maintain themselves due to physical or mental disability.<sup>453</sup>

#### **5.5.2.7 GRANT-IN-AID**

This grant is for someone whose physical or mental condition requires them to be regularly attended to by someone else (called a care-giver).<sup>454</sup>

### **5.5.3 THE LINK BETWEEN SOCIAL GRANTS AND REALISING THE RIGHT TO FOOD**

In the introductory Chapter it was explained how the receipt of a social assistance grant from the state can assist in realising the right to sufficient food in that grant holders are more likely to be able to afford to buy food. This is particularly important for those who qualify for social grants as they are highly vulnerable groups to hunger, malnutrition and food insecurity. The 2001 report of the Ministerial Committee on Abuse, Neglect and Ill-treatment of Older Persons substantiates this point by estimating that 80% of elderly persons have no other income apart from their social assistance grant.<sup>455</sup> So clearly the social assistance grant has a

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<sup>451</sup> S 10 of the Social Assistance Act. Section 10 should be read together with s 5 and regulation 2 of the Regulations in terms of the Social Assistance Act 13 of 2004 (GN R162 in GG 27316 of 22 February 2005).

<sup>452</sup> Krüger “ ‘Come Back When You Are 65, Sir’: Discrimination in Respect of Access to Social Assistance for the Elderly”. Forthcoming in *LDD* 2006(2). See also Matyu “Men Challenge Ruling Which Allows Women Earlier Pension” *The Herald* (11 November 2005) Accessed at <http://www.theherald.co.za/herald/2005/09/16/news> on 25 October 2006. This constitutional challenge will be very briefly considered a little later in this Chapter.

<sup>453</sup> S 11 of the Social Assistance Act.

<sup>454</sup> S 12 of the Social Assistance Act.

<sup>455</sup> *Mothers and Fathers of the Nation: The Forgotten People* (2001) Report of the Ministerial Committee on Abuse, Neglect and Ill-treatment of Older Persons at [www.polity.org.za/html/govdocs/reports/welfare/2001](http://www.polity.org.za/html/govdocs/reports/welfare/2001). Accessed on 21 October 2006.

crucial role to play in meeting the basic needs, including food, of these people. Alternatively, it is possible for the recipient to use the social grant to buy the means to be able to produce their own food, such as farming implements.

Coomans and Yapko note that South Africa's social security system is extensive by developing world standards. However, this positive aspect is tempered by the fact that a large percentage of those who qualify to receive benefits do not do so due to various problems.<sup>456</sup> Van der Merwe estimates that less than a quarter of those in need of social assistance in South Africa actually benefit from the social security system.<sup>457</sup> Liebenberg lists various problems, mainly administrative in nature,<sup>458</sup> which she sees as impeding access to appropriate social assistance. These identified problems include inadequate systems for re-registering qualified grant beneficiaries in certain provincial welfare departments, major backlogs in processing grant applications and actually paying the grants, and a general lack of satisfactory infrastructure.<sup>459</sup> Liebenberg also cites a lack of public awareness in affected communities on the workings of the social security system and specifically eligibility requirements for grants.<sup>460</sup> The 2002 Report of the Committee of Inquiry into a Comprehensive System of Social Security for South Africa (known as the Taylor Report) also lists various causes of qualified people struggling to receive social grants.<sup>461</sup> The interconnectedness of social security provision with the right to food highlights a major concern that those who often struggle to access social grants to which they are entitled, for the above-mentioned reasons and others, are also those who are most vulnerable to hunger and malnutrition.<sup>462</sup>

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<sup>456</sup> Coomans & Yapko "A Framework on the Right to Food- An International and South African Perspective" 29.

<sup>457</sup> Van der Merwe "Social Transformation in South Africa by Means of Social Assistance: A Legal Perspective" (4 November 1998) 21. Cited in Olivier; Okpaluba; Smit and Thompson (eds) *Social Security Law - General Principles* 17.

<sup>458</sup> The commonly encountered problem of a lack of administrative justice when it comes to processing social grants has been shown in Chapter 4.

<sup>459</sup> Liebenberg "The Right to Social Assistance: The Implications of *Grootboom* for Policy Reform in South Africa" 243 to 244.

<sup>460</sup> *Ibid.*

<sup>461</sup> Examples of the factors indicated in the Report were claimants being unable to travel to payment points, often due to geographical isolation, and highly inefficient payment systems. "Transforming the Present – Protecting the Future: Report of the Committee of Inquiry into a Comprehensive System of Social Security for South Africa." Draft Consolidated Report (2002) 48 (This will be termed the Taylor Report in this dissertation).

<sup>462</sup> Coomans & Yapko "A Framework on the Right to Food- An International and South African Perspective" 30.

The monthly value of each type of social grant is increased periodically by the state to allow for inflationary price increases.<sup>463</sup> The value of social assistance paid out by the state in the form of grants increased by approximately 20 percent per year from R42.9 billion in 2002/03 to R74.2 billion in 2004/2005.<sup>464</sup> The values of social grants per month for the 2006/2007 tax year are as follows: the Child Support Grant amount is R190; the Older Persons Grant, the Care Dependency Grant and the Disability Grant are R820 and the Foster Child Grant is R590.<sup>465</sup> It has been argued that the existing levels of these grants are too low to assure an acceptable minimum standard of living.<sup>466</sup> The Finance Minister acknowledged in his 2006 Budget Speech that the value of the grants is modest, taking cognizance of the cost of living.<sup>467</sup> However, it is submitted that in a developing country like South Africa, with numerous pressing calls on limited state resources, the government cannot be criticized for the size of the existing grants. Were budgetary constraints not a necessary factor to consider, then clearly the value of social grants could and should be increased further. However, in that there are clear limitations as to the money available for social grants, then provided that the value of the grants is objectively reasonable in relation to budgetary constraints and the needs which the grants aim to assist with, then such allocation limitations are both acceptable and necessary. It will be argued later that a more urgent need is to provide some sort of social assistance to those in great need who currently fall outside the social security net totally.

In support of the submission that the current value of grants is objectively reasonable in light of South Africa's resource limitations, it should be noted that current government spending on social grants ranks alongside education as its highest expenses.<sup>468</sup> Finance Minister Manual accurately identifies the key issue in this context as follows:

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<sup>463</sup> South African Human Rights Commission *The Right to Food* Fifth Economic and Social Rights Report Series, 2002/2003 (2004) 4.

<sup>464</sup> 2006 National Budget Speech of Finance Minister, Trevor Manual. Accessed at [www.info.gov.za/speeches/2006/06021515501001.htm](http://www.info.gov.za/speeches/2006/06021515501001.htm) on 10 July 2006.

<sup>465</sup> GN 294 in GG 28672 of 31 March 2006.

<sup>466</sup> Liebenberg and Tilley *Poverty and Inequality Hearings: Social Security Theme* (28 April 1998) 11. This same view was also expressed in the more recent Taylor Report which found that those receiving social grants remain poor notwithstanding the grants they receive. "Transforming the Present – Protecting the Future: Report of the Committee of Inquiry into a Comprehensive System of Social Security for South Africa". Draft Consolidated Report (2002) 59.

<sup>467</sup> 2006 National Budget Speech of Finance Minister, Trevor Manual. Accessed at [www.info.gov.za/speeches/2006/06021515501001.htm](http://www.info.gov.za/speeches/2006/06021515501001.htm) on 10 July 2006.

<sup>468</sup> *Ibid.*

“The challenge remains, to balance these income support commitments with continued strengthening of expenditure on infrastructure and service delivery.”<sup>469</sup>

In other words, social grants on their own are not the solution towards adequately alleviating the scourge of poverty in South Africa. Social grants do provide a crucial mechanism for providing basic assistance for those in great need. However, meaningful development and poverty reduction require a multi-faceted approach along the lines proposed by the Finance Minister in the above-mentioned quotation.

## **5.5.4 A CRITIQUE OF SPECIFIC TYPES OF GRANTS**

### **5.5.4.1 CHILD SUPPORT GRANT**

The South African Human Rights Commission commends government for prioritising the needs of children.<sup>470</sup> In relation to the extension of the child support grant from the earlier limit of children under 11 years to children under 14 years, it is submitted that this move should be welcomed as an important poverty alleviation tool which will allow qualifying parents of children in the 11- to 13-year age group to better meet their child’s basic needs, including food. The SAHRC’s *Right to Food* Report proposes that the child support grant be extended further to children under the age of 18.<sup>471</sup> This proposed further extension makes sense in that children up to the age of 18 are equally likely to be in need of support from their parents. Furthermore, 18 years is the threshold for the definition of a child as contained in the Child Care Act.<sup>472</sup>

Delany notes that child support grants are lacking in failing to cater for child-headed households.<sup>473</sup> In other words, where the primary care-giver of a child under 14 is themselves 16 or under, no provision is made for a child support grant. Goldblatt and Liebenberg argue that the state is constitutionally bound to provide child support grants to children who

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<sup>469</sup> *Ibid.*

<sup>470</sup> South African Human Rights Commission *The Right to Social Security*. Fifth Economic and Social Rights Report Series, 2002/2003 (2004) 25.

<sup>471</sup> South African Human Rights Commission *The Right to Food* Fifth Economic and Social Rights Report Series, 2002/2003 (2004) ix. This proposal has also been made by Liebenberg. Liebenberg “The Right to Social Assistance: The Implications of Grootboom for Policy Reform in South Africa” 248.

<sup>472</sup> The Child Care Act 74 of 1983. Definitions section.

<sup>473</sup> Delany *Rights to Reality - The Right to Social Security, with Particular Emphasis on the Legal Resources Centre’s Welfare Project in the Eastern Cape* (2003) 27.

themselves are supporting other children in their household.<sup>474</sup> This anomaly must be urgently remedied, especially in the light of the HIV/Aids pandemic which has sadly made such child-headed households far from uncommon. Haarman's research identifies a sharp increase in the number of so-called Aids orphans,<sup>475</sup> which ties in with an increased number of child-headed households. A failure to remedy this situation is very likely to deny such families and children their constitutional rights to sufficient food and adequate nutrition.

#### **5.5.4.2 DISABILITY GRANT**

At the time of its formulation, the White Paper for Social Welfare found that there were significantly more people suffering from disabilities than the number of disability grants being received.<sup>476</sup> If this position continues today (no more up to date report has been made), then urgent steps are called for to ensure that disabled persons in need of assistance receive state grants. Delany raises another pertinent criticism of the welfare system *vis-a-vis* disability grants. She argues that the means test used may discourage disabled persons from seeking income from work they are able to perform, because holders of disability grants forfeit benefits if they earn small amounts of money.<sup>477</sup> It is submitted that a policy change is called for in relation to the granting of disability grants (which may be equally applicable to other social grants for adults) in terms of which grant holders are encouraged to seek alternative forms of income to supplement their grants. The *status quo* creates a disincentive for grant holders to seek work (especially if it is likely to be low paying) and in so doing promotes dependency on social assistance.

#### **5.5.4.3 OLDER PERSON'S GRANT**

It has already been noted that the differentiation in the age for payment of older person's grants between women (60 years) and men (65 years) is currently the subject of a

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<sup>474</sup> Goldblatt and Liebenberg "Giving Money to Children: The State's Constitutional Obligations to Provide Child Support Grants to Child Headed Households" (2004) Vol 20 Part 1 *SAJHR* 151.

<sup>475</sup> Haarmann "Social Assistance in South Africa: Its Potential Impact on Poverty" (2000) 105.

<sup>476</sup> Unfortunately the White Paper does not indicate or suggest reasons for the large number of disabled persons not receiving grants. "White Paper for Social Welfare" GN 1108 in Government Gazette 18166 (8 August 1997) Accessed at [www.gov.za/whitepaper/1997/soswel97.htm](http://www.gov.za/whitepaper/1997/soswel97.htm) on 19 February 2006. Chapter 7, point 8.

<sup>477</sup> "White Paper for Social Welfare" GN 1108 in Government Gazette 18166 (8 August 1997) Accessed at [www.gov.za/whitepaper/1997/soswel97.htm](http://www.gov.za/whitepaper/1997/soswel97.htm) on 19 February 2006. Chapter 7, Point 8.

Constitutional challenge.<sup>478</sup> Clearly the differentiation is *prima facie* unfairly discriminatory, but it waits to be seen whether the previously disadvantaged status of women (as recognised in the Employment Equity Act)<sup>479</sup> will mean that this gender discrimination will be held to be fair. If the differentiation is held to be unfair, and due to budgetary constraints state old-age pensions for men and women are set at a “middle-ground” of for argument’s sake 62 and a half years, then it would appear as though on the whole the ability of older persons to meet their basic needs, such as the provision of adequate food, will not have been advanced.

According to Liebenberg and Tilley,<sup>480</sup> research indicates that the old-age pension system has various poverty-alleviation advantages, including:

- A notable impact in rural areas;
- A positive impact on the welfare of other household members and household security, where the older person’s grant is used to support entire households;<sup>481</sup>
- The achievement of an excellent take-up rate;<sup>482</sup>
- The promotion of gender and inter-provincial equity.

It is submitted that Liebenberg and Tilley’s comments apply equally to realising the right to food, a core component of poverty-alleviation. For this reason some of their comments will be considered further. It has already been noted that the most serious food shortages and food insecurity exists in rural areas. Therefore the sizeable impact of old-age pensions in rural areas is a positive move. However, the fact that people in rural areas remain the most at risk

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<sup>478</sup> Krüger “ ‘Come back when you are 65, Sir.’: Discrimination in respect of access to social assistance for the elderly” Forthcoming in *LDD* 2006(2). See also Matyu “Men challenge ruling which allows women earlier pension” *The Herald* (11 November 2005) Accessed at [http://www.theherald.co.za/herald/2005/09/16/news/n04\\_16092005.htm](http://www.theherald.co.za/herald/2005/09/16/news/n04_16092005.htm) on 25 October 2006.

<sup>479</sup> Act 55 of 1998.

<sup>480</sup> Liebenberg and Tilley *Poverty and Inequality Hearings: Social Security Theme* 11.

<sup>481</sup> According to the White Paper for Social Welfare, in black households each older person’s grant sustains an average of five other people. “White Paper for Social Welfare” GN 1108 in Government Gazette 18166 (8 August 1997) ([www.gov.za/whitepaper/1997/soswel97.htm](http://www.gov.za/whitepaper/1997/soswel97.htm)) accessed on 19 February 2006. Chapter 7, point 7. The redistributive trait of old-age grants in South Africa is also considered by May, who attributes the very survival of vulnerable people to the grants. May believes that the sharing of old-age grants in multigenerational families forms an important safety net for other members of older households. May *Chronic Poverty and Older People in South Africa* (February 2003) Chronic Poverty Research Centre Working Paper 25, 25.

<sup>482</sup> This would appear to be in contradiction with the findings of Yapko and Coomans referred to earlier in this dissertation.

to having inadequate access to food indicates that the impact of pensions in rural areas has not done enough to alter this imbalance.

The aforementioned argument that the utilisation of old-age pensions to support whole families is a positive development is countered by other writers. Olivier, Mpedi and Dekker, for example, see in a negative light the fact that money earmarked for pensioners is frequently used by the beneficiary's whole household, thereby not providing the desired assistance to the grant beneficiary.<sup>483</sup> I think that to criticise the use of old-age pensions as a means of supporting the recipient's extended family is a pointless exercise. It is understandable that a household will use the financial means at its disposal to support everyone in the household. The solution is rather to come up with ways by which other members of such a household will be able to meet their own basic needs, such as the provision of sufficient food or means to produce sufficient food. The other forms of social assistance and security discussed and proposed later in this Chapter, such as greater use of the social distress grant, the creation of a Basic Income Grant and the implementation of viable income generation and job creation strategies are possible means of reducing household reliance on old-age grants.

The argument that the provision of old age pensions promotes gender and inter-provincial equity must be considered in the light of the continuing gender and geographical inequality in relation to access to sufficient food.<sup>484</sup> Therefore, whilst the provision of grants might well promote equity to some extent, severe inequality remains.

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<sup>483</sup> Olivier; Mpedi and Dekker "Accommodating Informal Social Security within Social Security Systems: Observations From a Southern African Perspective" (2002) *Conference on Social Values, Social Policies: Normative Foundations of Changing Social Policies in European Countries* (unpublished paper prepared for a conference held at Tilburg, 29-31 August).

<sup>484</sup> See footnotes 13 and 15 of Chapter 1 which reflect this inequality.



### 5.5.5 CONCLUDING COMMENTS AS TO SOCIAL GRANTS

Notwithstanding the problems in rolling out social grants, the SAHRC notes that the provision of social grants has, together with the National Food Emergency Scheme, provided the greatest contribution towards fulfilling the right to food.<sup>485</sup> The extensive impact of social grants is evidenced by there being 5.6 million social grant recipients by the end of March 2003.<sup>486</sup>

Perhaps the most important commentary on the inadequacy of existing social security system in South Africa is the Taylor Report, as it was specifically mandated to make these findings.<sup>487</sup> Whilst noting positive aspects of poverty-relief promoted by the social security system in place, on the basis of its extensive and consultative research, the Taylor Report found that the existing social security system had failed to-date to make significant inroads to reducing poverty.<sup>488</sup> In substantiating this finding, the Taylor Report noted that about half of those in need of social security (what it termed “poor people”) live in households not benefiting from any social security and even those who do benefit remain “poor”.<sup>489</sup> Unquestionably, the overall conclusion made in the Taylor Report is that the social security system in place at the time of the Report’s work (which has not changed greatly in the few years hence) is inadequate to meet the existing needs. This conclusion is mirrored by Liebenberg who believes that the support provided by the existing social assistance programmes in South Africa does not guarantee a minimum standard of living for many poor members of society.<sup>490</sup> Significantly for this research, Liebenberg goes on to say that:

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<sup>485</sup> South African Human Rights Commission *The Right to Food* Fifth Economic and Social Rights Report Series, 2002/2003 (2004) 3.

<sup>486</sup> South African Human Rights Commission *The Right to Food* Fifth Economic and Social Rights Report Series, 2002/2003 (2004) xvi. The main contributors to this figure were 2.5 million child support grants, 2 million old person’s grants, 897050 disability grants and 133309 foster child grants. *Ibid.*

<sup>487</sup> “Transforming the Present – Protecting the Future: Report of the Committee of Inquiry into a Comprehensive System of Social Security for South Africa.” Draft Consolidated Report (2002).

<sup>488</sup> “Transforming the Present – Protecting the Future: Report of the Committee of Inquiry into a Comprehensive System of Social Security for South Africa.” Draft Consolidated Report (2002) 56. The Taylor Report estimated the number of needy people failing to benefit from social security in South Africa to be in the region of 13 million. *Ibid.*

<sup>489</sup> “Transforming the Present – Protecting the Future: Report of the Committee of Inquiry into a Comprehensive System of Social Security for South Africa.” Draft Consolidated Report (2002) 59.

<sup>490</sup> Liebenberg “The Right to Social Assistance: The Implications of *Grootboom* for Policy Reform in South Africa” 248.

“unless measurable progress is made to improve the implementation of social assistance programmes, national and provincial departments of social development will be vulnerable to constitutional challenge”.<sup>491</sup>

This quote of Liebenberg relates specifically to the constitutional right to social assistance in section 27(1)(c). It is submitted that due to the link between the provision of social assistance and realising the right to food, this argument is equally applicable to the merits of a constitutional challenge based on the right to food.

Govindjee astutely notes a lack of proper protection against unemployment<sup>492</sup> as a glaring gap in the South African social assistance grant scheme.<sup>493</sup> Olivier *et al* consider informally employed people to form part of this neglected group.<sup>494</sup> Such informally employed persons are not covered by the social insurance schemes of the formal sector, nor do they receive social grants unless falling under one of the specifically created grant types. In terms of the existing social assistance network, children up to the age of 14 are generally catered for,<sup>495</sup> as are old-age pensioners and those with certain specific needs (such as disabled persons), but able-bodied people between these age thresholds are largely left to fend for themselves.<sup>496</sup> This “forgotten group”, as it were, are extremely vulnerable to having inadequate food. It is in the context of this gap and the general social security system shortcomings identified by the Taylor Report that the social relief of distress grant and other proposed ways of alleviating this problem, such as the effective implementation of income generation and job creation strategies and the proposed Basic Income Grant, need to be considered.

## 5.6 SOCIAL RELIEF OF DISTRESS GRANT

This grant created by the Fund Raising Act 107 of 1978 provides for immediate, temporary, material assistance to relieve distress.<sup>497</sup> The Act lists the categories of people in need of

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<sup>491</sup> Liebenberg “The Right to Social Assistance: The Implications of *Grootboom* for Policy Reform in South Africa” 246.

<sup>492</sup> Limited income protection is provided in terms of the Unemployment Insurance Fund, but such protection is of limited duration and is not applicable to those who have never been employed.

<sup>493</sup> Govindjee *The Constitutional Right to Social Assistance as a Framework for Social Policy in South Africa: Lessons from India* 133.

<sup>494</sup> Olivier; Okpaluba; Smit and Thompson (eds) *Social Security Law - General Principles* 4.

<sup>495</sup> Subject only to the child-headed household exception discussed earlier.

<sup>496</sup> Govindjee *The Constitutional Right to Social Assistance as a Framework for Social Policy in South Africa: Lessons from India* 133.

<sup>497</sup> Regulations 26 to 29 provide more detail as to social relief of distress grants.

temporary material assistance who qualify to apply for a grant.<sup>498</sup> In addition to this broad range of applicable applicants, the Director-General is given a discretion, in exceptional circumstances, to provide a social relief of distress grant where he or she reasonably believes undue hardship will result from a grant not being provided.<sup>499</sup> Significantly, a social relief of distress grant cannot be held in conjunction with a social grant.

Social relief of distress grants are normally only provided for a maximum of three months.<sup>500</sup> In exceptional circumstances, however, this period may be extended for a maximum further three months.<sup>501</sup> The amount of the grant is linked with the amounts payable at the time for adult or child social grant recipients. The amount of the distress grant is limited to the maximum monthly social grant payable to adults, if the distress grant applicant is an adult applying for herself, and to the size of child support grant for an applicant qua guardian.<sup>502</sup>

### **5.6.1 SOCIAL RELIEF OF DISTRESS GRANT AND THE RIGHT TO FOOD**

This grant is especially significant to this research because it has the potential to provide emergency feeding in times of great need. This last point is emphasised by the fact that in practice the social relief of distress grant takes the form of successful applicants being issued with food vouchers.<sup>503</sup> My arguments in favour of greater use of the social relief of distress grant in appropriate circumstances will mirror the arguments in favour of the Basic Income Grant (to be discussed later). Healthy, unemployed adults below a determined age-threshold

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<sup>498</sup> The specifically listed categories are: people with social grant applications pending or who have appealed against the suspension of their grants; sick people who cannot work as a result but are likely to recover within six months; single parents unable to obtain maintenance from the other parent; a single parent whose deceased partner left them no inheritance; a parent whose spouse (who was the family's breadwinner) has been institutionalised for under six months; those affected by natural disasters like tropical cyclones or fires or other emergencies; those unassisted by other organizations; people with no one in their household benefiting from a social grant.

<sup>499</sup> Fund Raising Act 107 of 1978.

<sup>500</sup> Brand "Between Availability and Entitlement: The Constitution, *Grootboom*, and the Right to Food " *Law, Democracy and Development* (2003) Vol 7 No 1 (1) 17.

<sup>501</sup> Liebenberg and Tilley *Poverty and Inequality Hearings: Social Security Theme* (background paper for South African National Non-Governmental Organisation (SANGOCO), the South African Human Rights Commission and the Commission for Gender Equality 11.

<sup>502</sup> Regulation 29 in Government Notice No R418 (31 March 1998) as amended by Government Notice No R1233 (23 November 2001). The regulations also allow the Director-General, in exceptional circumstances, to fund transportation costs to a medical facility where no other transport options exist or to transport an applicant to begin work so that they will no longer be dependent on the state.

<sup>503</sup> Liebenberg and Tilley *Poverty and Inequality Hearings: Social Security Theme* (background paper for South African National Non-Governmental Organisation (SANGOCO), the South African Human Rights Commission and the Commission for Gender Equality 11.

are not eligible for child grants or old-age pensions. Such people are clearly vulnerable to food insecurity. The social relief of distress grant has the potential to ensure that the state's social security net is widened somewhat to provide basic assistance to such people in times of emergency. The fact that in practice this grant takes the form of food vouchers means that no argument can be made that recipients may well waste a monetary grant on unnecessary and harmful practices or substances like gambling, alcohol and illegal drugs.

Govindjee points out that in practice the award of social relief of distress grants are rare.<sup>504</sup> Brand goes even further to provide examples of how the social relief of distress grant has fallen into disuse.<sup>505</sup> The case of *Kutumela v Member of the Executive Committee for Social Services, Culture, Arts and Sport in the North West Province* provides authority for shortcomings of the social relief of distress grant.<sup>506</sup> In this case indigent applicants who clearly qualified for a grant did not receive it owing to administration shortcomings in the North West provincial government. In light of the fact that the recipients of Social Relief of Distress Grants receive food stamps, it is arguable that the *Kutumela* case is the closest case yet to a direct right to food challenge. The *Kutumela* case also provides authority for the link between the need for administrative justice for the provision of a socio-economic right. Furthermore the case is an indicator that the state policy in relation to the implementation and roll-out of the social relief of distress grant has not been reasonable.<sup>507</sup> In light of the potential of the grant to feed hungry people during times of crisis, the clear under-utilisation of the grant should be urgently remedied.

It would be an incomplete discussion of the *Kutumela* case to not mention the government's response to the order wherein it formulated the Draft Procedure Manual for Social Relief of Distress.<sup>508</sup> It would appear as though the state adopted the Manual in response to the threat of contempt of court proceedings against the Minister of Social Development in the *Kutumela* case. What the Manual does is provide for the implementation of social relief of distress

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<sup>504</sup> Govindjee *The Constitutional Right to Social Assistance as a Framework for Social Policy in South Africa: Lessons from India* 131.

<sup>505</sup> Brand "Between Availability and Entitlement: The Constitution, *Grootboom*" in *Law, Democracy and Development* 18.

<sup>506</sup> Case 671/2003.

<sup>507</sup> Due to the link between the social relief of distress grant (which takes the form of food vouchers) and realising the right to food, it can be clearly argued that an unreasonable approach to implementation of this grant is also unreasonable in so far as it forms part of the broader right to food.

<sup>508</sup> www.gov.za (accessed on 1 November 2006). November 2005 and February 2006 drafts of the Procedure Manual for Social Relief of Distress exist.

grants in instances of undue hardship. The Manual provides guidelines on who should be considered to be facing “undue hardship” and hence applicable for the grant. The Manual lists various categories of vulnerable people as instances of those facing “undue hardship”. Although a discretion remains, examples of these categories are unemployed people of 50 or older not qualifying for another form of pension who cannot support themselves or their children; unemployed people evicted from where they live; singles parents unable to work due to their care-giving responsibilities and therefore cannot adequately feed themselves or their dependants; families where there are symptoms of malnutrition and stunted growth in children and homeless people without access to a nutritious meal.<sup>509</sup> It is submitted that these guidelines if properly implemented provide a very useful starting point for ensuring that some of the most food insecure people in society are fed. The Draft Manual also sets out a mechanism for accessing funds for relief, provides control mechanisms and simplifies the application procedures.<sup>510</sup> As has been argued throughout this research, the need for proper roll-out rather than rights on paper only, means that these measures to simplify and expedite how the scheme operates should also be welcomed. A final positive aspect of the Manual is its attempt to counter continued poverty through the integration of social relief measures with employment creation schemes.<sup>511</sup> Again this development should be applauded as the need to link social assistance and social development is imperative. It would therefore appear as though the Draft Procedure Manual for Social Relief of Distress is an extremely positive move. The question now remains how successful implementation of the Social Relief of Distress Grant will be in light of the rules and procedures contained in the Manual.

There are certain criticisms of the nature and implementation of the distress grant which it is submitted are less compelling. Brand regards the temporary nature of the distress grant as being a concern.<sup>512</sup> The distress grant has been established as an emergency measure for times of crisis. It is therefore submitted that to use this grant as a longer-term social security measure is to extend its use too far. Other means need to be formulated to provide longer-term assistance to this category of needy people. The distress grant has also been criticised

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<sup>509</sup> Paraphrased from latest Draft Procedure Manual for Social Relief of Distress. February 2006. [www.gov.za](http://www.gov.za) (accessed on 1 November 2006).

<sup>510</sup> *Ibid.* Regulation 27.

<sup>511</sup> *Ibid.* Regulation 26(3).

<sup>512</sup> Brand “Between Availability and Entitlement: The Constitution, *Grootboom*” *Law, Democracy and Development* 18.

for the discretionary nature of it being awarded.<sup>513</sup> However, it is submitted that this criticism is also lacking in substance as the very nature of the grant requires a judgement-call as to whether the applicants require immediate, material assistance to relieve the emergency situation they face. The normal rules of administrative justice would apply to the decision whether to accept or reject the application. Furthermore, clear guidelines are provided as to the specific situations of distress envisaged by the Fund Raising Act for the provision of the grants together with Director-General's wider discretion, in exceptional circumstances, to provide a grant to prevent undue hardship.

## 5.7 INCOME GENERATION AND JOB CREATION STRATEGIES

The formulation of proposed income generation and job creation strategies fall beyond the scope of this research. In addition to simply making note of a few such strategies which tie in with food production, it suffices to say that creating jobs and generating income are keys ways of realising the right to food. Govindjee makes the general observation that the South African government is making increased attempts to adopt economic policies at a national level which stimulate economic growth and job creation.<sup>514</sup>

The Community Based Public Works Programme of the Department of Public Works aims to alleviate poverty and has the rural poor as a focus area.<sup>515</sup> Improved access to sufficient food should result from poverty reduction, especially in rural areas where it has been shown that food shortages and malnutrition are most prevalent.

The Poverty Relief Programme of the Department of Public Works provides money to worthy, registered non-profit organisations. The type of projects funded are food production clusters, especially for households affected by HIV/ Aids, income generation projects and skills development.<sup>516</sup>

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<sup>513</sup> Liebenberg and Tilley *Poverty and Inequality Hearings: Social Security Theme* (background paper for South African National Non-Governmental Organisation (SANGOCO), the South African Human Rights Commission and the Commission for Gender Equality 11.

<sup>514</sup> Govindjee *The Constitutional Right to Social Assistance as a Framework for Social Policy in South Africa: Lessons from India* 116.

<sup>515</sup> South African Human Rights Commission *The Right to Social Security*.Fifth Economic and Social Rights Report Series, 2002/2003 (2004) 25.

<sup>516</sup> Kallman *Knowing and Claiming Your Right to Food* 11.

The Poverty Relief Programme, Community Based Public Works Programme and similar projects of the Department of Public Works are obviously welcomed, mainly due to their employment-creation potential. For example, the Department of Public Works' 2002/2003 Annual Report indicated that 20 539 new jobs were created due to local-level public works activities.<sup>517</sup> These and other income generation and job creation opportunities are positive initiatives in helping households to meet their basic needs, including the provision of sufficient food. According to the South African Human Rights Commission, these public works programmes are put together so as to meet an integrated cluster of needs, with employment-creation spin-offs and the production of assets and income to assist in meeting basic needs, including food.<sup>518</sup> It is submitted that state recognition of the need for a holistic approach to poverty alleviation, with public works projects as a key component, is evidenced by significantly increased government spending on poverty reduction and vulnerability.<sup>519</sup>

Govindjee argues that state employment creation schemes should not be understood to constitute a state plan for social assistance.<sup>520</sup> A similar argument can be made that employment creation schemes should not be considered as a state plan for meeting its right to food obligations. However, it is respectfully submitted that the key question is whether people are being adequately fed or not. Whether their proper feeding is a result of a direct food-provision scheme or via job creation which empowers people to buy their own food is not of great importance. However, the aforementioned arguments that food provision for those in positions of crisis is called for, is not changed by this point. Similarly, Mashava notes that if the economy cannot generate enough employment for people to be self-sufficient, social assistance becomes a key way of alleviating poverty.<sup>521</sup> It is submitted that in the context of the right to food such state assistance must take the form of direct provision of food (where necessary) and other measures to facilitate the provision or the means to produce or acquire adequate food in other all other circumstances.

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<sup>517</sup> Cited in South African Human Rights Commission *The Right to Food*. Fifth Economic and Social Rights Report Series, 2002/2003 (2004) 49 and South African Human Rights Commission *The Right to Social Security* Fifth Economic and Social Rights Report Series, 2002/2003 (2004) 25.

<sup>518</sup> South African Human Rights Commission *The Right to Food*. Fifth Economic and Social Rights Report Series, 2002/2003 (2004) 50.

<sup>519</sup> South African Human Rights Commission *The Right to Food*. Fifth Economic and Social Rights Report Series, 2002/2003 (2004) xi.

<sup>520</sup> Govindjee *The Constitutional Right to Social Assistance as a Framework for Social Policy in South Africa: Lessons from India* 116 and 117.

<sup>521</sup> Mashava "Introduction to the Right to Social Security in the South African Constitution" in Mashava (ed) *A Compilation of Essential Documents on Economic, Social and Cultural RightsI: Economic and Social Rights Series* 17.

## **5.8 SOME PROPOSED STATE IMPLEMENTATION TOOLS WHICH ARE LIKELY TO IMPACT ON THE RIGHT TO FOOD**

### **5.8.1 BASIC INCOME GRANT**

The Basic Income Grant (BIG) has been put forward as one way to plug some of the aforementioned gaps in the social security system.<sup>522</sup> A number of interested organisations, including the Congress of South African Trade Unions (COSATU), the Black Sash, the South African Council of Churches and the South African National NGO Coalition have formed the Coalition of South Africans for a Basic Income Grant (the Coalition) to put weight behind the introduction of BIG in South Africa.<sup>523</sup> This dissertation does not attempt to comprehensively consider all the pros and cons of BIG. The aim of including it in this research is to highlight it as an option still available to the state to achieve its social security obligations, and in particular the right to food.

The Coalition has proposed the introduction of a basic income grant, of at least R100 per month,<sup>524</sup> which would be paid out to all citizens regardless of their age, socio-economic or other status.<sup>525</sup> The Taylor Report likewise understood BIG as a general social assistance grant applicable to all in South Africans.<sup>526</sup> In other words, to relieve the administrative burden of determining who should receive a grant, the grant would be payable to all and recovered by way of taxation from those with financial means.<sup>527</sup> Liebenberg therefore indicates that although the grant would not only be for the poor, its target would in fact be the

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<sup>522</sup> BIG Financing Group *Breaking the Poverty Trap: Financing a Basic Income Grant in South Africa* 2.

<sup>523</sup> The Coalition of South Africans for a Basic Income Grant Accessed at [www.drc.org.za/docs](http://www.drc.org.za/docs) on 4 May 2006.

<sup>524</sup> This figure was not unanimously accepted across the Coalition, with some arguing for a higher figure. However, the amount of R100 is significant in that four leading economists who researched the financial viability of BIG were unanimous in its affordability at a R100 per month per person level. BIG Financing Group *Breaking the Poverty Trap: Financing a Basic Income Grant in South Africa* 7 and 56.

<sup>525</sup> The Coalition of South Africans for a Basic Income Grant Accessed at [www.drc.org.za/docs](http://www.drc.org.za/docs) on 4 May 2006.

<sup>526</sup> “Transforming the Present – Protecting the Future: Report of the Committee of Inquiry into Comprehensive System of Social Security for South Africa.” Draft Consolidated Report (2002) 61. However, Liebenberg indicates that whilst BIG would be paid to everyone, including children, recipients of other social grants would be excluded. Liebenberg “The Right to Social Assistance: The Implications of *Grootboom* for Policy Reform in South Africa” 249.

<sup>527</sup> The Coalition proposes that the necessary funding for BIG could be raised from a combination of personal income tax, company tax, value-added tax and excise tax. BIG Financing Group *Breaking the Poverty Trap: Financing a Basic Income Grant in South Africa* 7.



poor and hence BIG would have a redistributive effect.<sup>528</sup> Significantly, the Coalition called for the acceptance of BIG as part of a comprehensive social protection strategy, of which BIG would form a part.<sup>529</sup>

A number of positive comments have been made as to BIG's potential as a useful tool to counter poverty in South Africa. Submissions made to and accepted by the Taylor Commission indicated the potential of BIG, more than any other potential social protection measure, to alleviate the worst affects of poverty and unemployment and to promote development.<sup>530</sup> The Coalition regards the creation and implementation of BIG as a key intervention to alleviate some of the poverty under which so many South Africans live<sup>531</sup> and to promote development.<sup>532</sup> COSATU indicates that BIG provides all households with income security, however small, thereby improving their stability and potential for further economic improvement.<sup>533</sup> On the basis of its extensive research, the Coalition concluded that BIG is both affordable and feasible to implement in South Africa.<sup>534</sup>

Notwithstanding the above-mentioned and other potential advantages of BIG and various calls for it to be accepted by government, Govindjee notes that government has to date decided against establishing a basic income grant<sup>535</sup> and has shown no signs of changing this decision.<sup>536</sup> The main arguments which have been raised against having a basic income grant include employment creation being preferable to handouts, the notion that BIG would create a culture of dependency, the possibility of public works projects being sidelined in favour of

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<sup>528</sup> Liebenberg "The Right to Social Assistance: The Implications of *Grootboom* for Policy Reform in South Africa" 249.

<sup>529</sup> BIG Financing Group *Breaking the Poverty Trap: Financing a Basic Income Grant in South Africa* 8.

<sup>530</sup> "Transforming the Present – Protecting the Future: Report of the Committee of Inquiry into Comprehensive System of Social Security for South Africa." Draft Consolidated Report (2002) 62.

<sup>531</sup> The Coalition of South Africans for a Basic Income Grant Accessed at [www.drc.org.za/docs](http://www.drc.org.za/docs) on 4 May 2006 and BIG Financing Group *Breaking the Poverty Trap: Financing a Basic Income Grant in South Africa* 7.

<sup>532</sup> BIG Financing Group *Breaking the Poverty Trap: Financing a Basic Income Grant in South Africa* 8.

<sup>533</sup> Cited in Liebenberg "The Right to Social Assistance: The Implications of *Grootboom* for Policy Reform in South Africa" 249.

<sup>534</sup> *Ibid.*

<sup>535</sup> BIG was rejected by Finance Minister, Mr Trevor Manuel in his 2004 *Budget Speech*. Accessed at [www.gov.za/speeches](http://www.gov.za/speeches) on 30 March 2006.

<sup>536</sup> Govindjee *The Constitutional Right to Social Assistance as a Framework for Social Policy in South Africa: Lessons from India* 136 and 137.

BIG and that BIG is neither affordable nor feasible to implement.<sup>537</sup> Each one of these criticisms was confronted head-on in the Coalition's research and, for what it is worth, found to be lacking in sufficient substance.<sup>538</sup>

In accordance with the separation of powers doctrine, government is perfectly entitled to reject BIG, as it has done, and to pursue any other (reasonable) policies it sees fit. However, it is submitted that a basic income grant of even just R100 would go some way to enabling all South Africans to have access to sufficient food. Govindjee regards continued academic argument in favour of BIG to be pointless, owing mainly to government's express rejection of the proposal.<sup>539</sup> Against this view, the South African Human Rights Commission's latest *Right to Food* Report says that BIG should continue to be considered as a poverty addressing option, especially for people of working age.<sup>540</sup> It is submitted that further lobbying for BIG as part of an overhauled social security system is called for in order to better realise the right to sufficient food in South Africa.

## 5.8.2 FRAMEWORK LEGISLATION RELATING TO FOOD

Framework legislation has been described as a new type of law, its main aim being to provide a single, all-encompassing and co-ordinated means for implementing national policy and strategy relating to a particular right.<sup>541</sup> Framework law is intended to cover the whole spectrum of issues related to a subject (like food security) and to facilitate a holistic, harmonized approach thereto.<sup>542</sup> In so doing, framework law highlights and accentuates the link between constitutional rights, policies and laws.<sup>543</sup>

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<sup>537</sup> BIG Financing Group *Breaking the Poverty Trap: Financing a Basic Income Grant in South Africa* 34 to 45.

<sup>538</sup> BIG Financing Group *Breaking the Poverty Trap: Financing a Basic Income Grant in South Africa* 63.

<sup>539</sup> Govindjee *The Constitutional Right to Social Assistance as a Framework for Social Policy in South Africa: Lessons from India* 136 and 137.

<sup>540</sup> South African Human Rights Commission *The Right to Food* Fifth Economic and Social Rights Report Series, 2002/2003 (2004) ix.

<sup>541</sup> Khoza "Realising the Right to Food in South Africa: Not by Policy Alone- A Need for Framework Legislation" 670.

<sup>542</sup> Coomans & Yapko "A Framework on the Right to Food- An International and South African Perspective" 20.

<sup>543</sup> Khoza "Realising the Right to Food in South Africa: Not by Policy Alone- A Need for Framework Legislation" 670.

Khoza says that framework law has four main generally accepted stages or parts: evaluation, drafting, implementation and monitoring, each with particular characteristics.<sup>544</sup> Firstly, evaluation can be understood as the way in which existing law and policy and their implementation are “audited” in order to fill gaps and avoid duplication in the current system. Secondly, drafting is the creation of the framework laws themselves. Significantly, Coomans and Yapko indicate that civil society has a central role to play in policy creation and planning.<sup>545</sup> Furthermore, the drafted framework laws should aim to translate a constitutional right (like the right to food) into definitions of different parts of the right, guidelines and targets.<sup>546</sup> Thirdly, implementation is the way in which the framework law is converted into realisation of the right. A significant difference between framework law and “ordinary” legislation is the creation of specific means of implementation, including powers, policies and possibly implementation benchmarks.<sup>547</sup> Finally, in terms of monitoring, Khoza argues that this becomes a far easier task in light of the creation of targets in an earlier stage in the process.<sup>548</sup> Linked with monitoring of compliance with the frameworks laws is enforcement and remedies. Coomans and Yapko indicate that enforcement and remedies may be political in nature in the form of parliament, or legal remedies by way of judicial or administrative mechanisms.<sup>549</sup>

A more controversial aspect of food framework legislation is the call by academics Khoza, Coomans and Yapko that the legislation should incorporate a minimum core right to food.<sup>550</sup> Arguments in favour of a minimum core right to food is based largely upon two General Comments of the United Nations Commission on Economic, Social and Cultural Rights.<sup>551</sup> However, the differences between the right to food in section 27 of the South African Constitution and the right to food in article 2(1) of the International Covenant on Economic,

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<sup>544</sup> Khoza “Realising the Right to Food in South Africa: Not by Policy Alone- A Need for Framework Legislation” 672.

<sup>545</sup> Coomans & Yapko “A Framework on the Right to Food- An International and South African Perspective” 24.

<sup>546</sup> Coomans & Yapko “A Framework on the Right to Food- An International and South African Perspective” 22.

<sup>547</sup> Khoza “Realising the Right to Food in South Africa: Not by Policy Alone- A Need for Framework Legislation” 673.

<sup>548</sup> *Ibid.*

<sup>549</sup> Coomans & Yapko “A Framework on the Right to Food- An International and South African Perspective” 23.

<sup>550</sup> Khoza “Realising the Right to Food in South Africa: Not by Policy Alone- A Need for Framework Legislation” 672 and Coomans & Yapko “A Framework on the Right to Food- An International and South African Perspective” 22.

<sup>551</sup> General Comments 3 and 12 of United Nations Commission on Economic, Social and Cultural Rights.

Social and Cultural Rights (the latter upon which the Commission issues authoritative interpretations) have been pointed out earlier in this research. A stronger argument made in favour of incorporating a minimum core right to food is based on a broad interpretation of South African Constitutional Court case law. Khoza argues that both the *Grootboom*<sup>552</sup> and *TAC*<sup>553</sup> decisions, in highlighting the need for government policy to protect the most vulnerable members of society in order to be reasonable, indirectly calls for the right to food to take a minimum form.<sup>554</sup> Coomans and Yapko similarly argue for the right to food in South Africa to be given a minimum core content below which the right loses its meaning.<sup>555</sup> This minimum core debate will be revisited below when food framework legislation is evaluated.

Now that the key characteristics of framework legislation have been pointed out, it is necessary to consider the arguments for its application to the right to food in South Africa. The Constitutional Court in *Grootboom*, in considering the government's housing policy, mentioned framework legislation as a method of effectively realising a right.<sup>556</sup> However, the court did not elaborate on the meaning of the concept further because it did not have to as existing national housing legislation was found to be in place already.<sup>557</sup> However, the same cannot be said for legislation relating to the right to food in South Africa. Hence an assessment of the advantages and disadvantages of creating food framework legislation is called for.

There is international law authority and encouragement from the United Nations Commission on Economic, Social and Cultural Rights for the creation of framework legislation for a co-ordinated national approach to the right to food.<sup>558</sup> Furthermore, the United Nations Special Rapporteur on the Right to Food has also called for national governments to set up framework legislation for the right to food in accordance with international law food

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<sup>552</sup> *Supra*.

<sup>553</sup> *Supra*. The basis of both these decisions will be explored in much greater detail in the next Chapter.

<sup>554</sup> Khoza "Realising the Right to Food in South Africa: Not by Policy Alone- A Need for Framework Legislation" 671.

<sup>555</sup> Coomans & Yapko "A Framework on the Right to Food- An International and South African Perspective" 22.

<sup>556</sup> *Grootboom* para 40.

<sup>557</sup> *Ibid*.

<sup>558</sup> General Comment 12, Paragraph 29 of the United Nations Commission on Economic, Social and Cultural Rights.

obligations.<sup>559</sup> The establishment of a co-ordinated legislative approach to the right to food must be a move in the right direction in light of the piecemeal approach of the South African government to date highlighted earlier in this Chapter. The creation of benchmarks to measure implementation of the right would allow more effective monitoring of whether people are receiving sufficient food and provide tangible means by which the right may be more easily actionable. The more concretised approach of food framework legislation to implementation, which goes beyond policies requiring elaboration by government, is what distinguishes framework legislation from the aforementioned National Food Security Bill for Coomans and Yapko.<sup>560</sup>

Academics have highlighted a number of other advantages of implementing food framework legislation in South Africa. Khoza argues that the involvement of civil society in the formulation of framework legislation law and policy would be a far more democratic process than the status quo.<sup>561</sup> Khoza also believes that framework law creates co-ordination and co-operation between state and non-state bodies and greater accountability in realizing the right to food.<sup>562</sup> Coomans and Yapko highlight that framework law can more clearly indicate the content of the right to food as well as establishing and accentuating the interdependence between the right to food and other rights like the rights to land and life.<sup>563</sup> This recognition of the interdependence of rights should be welcomed and accords with submissions made in Chapter 3 of this dissertation as to the connection between the right to food and other constitutional rights discussed.

Framework legislation can also be criticised on various grounds. The executive branch of government often has to adapt its plans to changing circumstances. For example, natural disasters like floods or famine are likely to significantly change both the food needs in the country and our food production potential. The establishment of benchmarks and targets in food framework legislation may well be inadequately flexible to deal with these changing

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<sup>559</sup> Cited in Coomans & Yapko “A Framework on the Right to Food- An International and South African Perspective” 20.

<sup>560</sup> Coomans & Yapko “A Framework on the Right to Food- An International and South African Perspective” 32.

<sup>561</sup> Khoza “Realising the Right to Food in South Africa: Not by Policy Alone- A Need for Framework Legislation” 680

<sup>562</sup> Khoza “Realising the Right to Food in South Africa: Not by Policy Alone- A Need for Framework Legislation” 672.

<sup>563</sup> Coomans & Yapko “A Framework on the Right to Food- An International and South African Perspective” 21.

eventualities caused. Furthermore, Coomans and Yapko question whether framework legislation is the most apposite place for dealing with policy issues.<sup>564</sup> To elaborate on this possible weakness, in a “normal” legislative setup the executive is given the room to develop policy within the broader confines of legislation. However, framework legislation could be said to overly fetter this discretion of the executive. Coomans and Yapko also indicate the risk that in its attempt to be so multi-faceted, food framework legislation has the potential to become highly complex and thereby unworkable.<sup>565</sup> However, notwithstanding the disadvantages of framework legislation, which do exist, the arguments in favour of its creation would appear to outweigh the possible negatives.

A last point which needs to be discussed is whether framework legislation on the right to food, if implemented, should incorporate a minimum core right to food. Khoza acknowledges that the Constitutional Court did explicitly reject the concept of a minimum core of rights in both *Grootboom* and *TAC*.<sup>566</sup> It is submitted that to explicitly incorporate a minimum core right to food in framework legislation cannot be done as it would go against existing judicial precedent. However, the creation of mechanisms to provide adequate food and nutrition to the most vulnerable members of society is both normatively called for to ensure that the right to food is a tangible right for those in great need, and would also follow the precedent of the Constitutional Court in the *Grootboom* and *TAC* judgments.

## 5.9 CHAPTER CONCLUSION

An October 2003 government report concluded that,

“government has both a constitutional obligation and political and moral commitment to ensuring that all in South Africa have the means to meet their basic needs”.<sup>567</sup>

It is submitted that this sentiment accurately reflects government’s obligations, including the duty to ensure everyone has access to sufficient food. This Chapter has considered some of the existing and proposed policies, programmes and laws for realising the right to food.

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<sup>564</sup> Coomans & Yapko “A Framework on the Right to Food- An International and South African Perspective” 24.

<sup>565</sup> *Ibid.*

<sup>566</sup> Khoza “Realising the Right to Food in South Africa: Not by Policy Alone- A Need for Framework Legislation” 671.

<sup>567</sup> Government Draft Report: “Towards a Ten Year Review” (October 2003) cited in BIG Financing Group *Breaking the Poverty Trap: Financing a Basic Income Grant in South Africa* 6.

Whilst various options are open to government, it seems as though government's current food stance is unlikely to pass constitutional scrutiny by the courts in relation to the right to sufficient food in section 27(1)(b) and the right of children to basic nutrition in section 28(1)(c).<sup>568</sup> Mubangizi argues that although there has yet to be a specific right to food constitutional challenge,<sup>569</sup> he predicts that in the event of such a challenge the courts will oblige the state to meet its constitutional obligations in light of the precedent in *Grootboom*.<sup>570</sup> In support of Mubangizi's view, I submit that the provision of sufficient food for all is an absolute priority for the South African government: a priority it is not adequately addressing at present.

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<sup>568</sup> In support of this submission, in addition to various other points made in this Chapter, the SAHRC noted that many people, especially children, had their right to food violated during the 2002/2003 reporting period due to poor government plans. South African Human Rights Commission *The Right to Food* Fifth Economic and Social Rights Report Series, 2002/2003 (2004) 3.

<sup>569</sup> Similarly, state provision of good nutrition for HIV/ Aids infected children or adults have yet to be challenged. South African Human Rights Commission *The Right to Food* Fifth Economic and Social Rights Report Series, 2002/2003 (2004) 8.

<sup>570</sup> Mubangizi *The Protection of Human Rights in South Africa: A Legal and Practical Guide* 137.

## **CHAPTER 6**

### **THE ENFORCEMENT OF SOCIO-ECONOMIC RIGHTS IN SOUTH AFRICA: FROM RIGHTS TO REALITY**

#### **6.1 INTRODUCTION TO THE CHAPTER**

The previous Chapters have shown that socio-economic rights, including the right to food, are enforceable and justiciable in South Africa. Ntlama highlights the importance of enforcement measures for socio-economic rights by arguing that:

“The real test for commitment to human rights lies in the mechanisms that are put in place for their enforcement. In order to ensure that socio-economic rights do not end up as mere paper rights, the progress made in realising these rights must be closely monitored.”<sup>571</sup>

However, in relation to such monitoring, it is vital to differentiate between state aversion and incapacity to make adequate provision for a particular right. Such a differentiation is crucial in determining whether a limitation of a constitutionally protected socio-economic right is acceptable. Engh correctly indicates that even where a state has committed itself formally to realising socio-economic rights (as South Africa has done through its progressive Constitution), it may not have adequate leadership and political will to take action towards realisation of these rights.<sup>572</sup> An example of unacceptable state conduct is the under-spending of budgetary allocations due to incapacity to properly access and manage funds. It is in just such circumstances that effective enforcement of state obligations, by the courts and other properly empowered bodies, is urgently required.

This Chapter deals mainly with the enforcement of socio-economic rights by South African courts.<sup>573</sup> The difficulty of coming up with effective judicial mechanisms to enforce the right

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<sup>571</sup> Ntlama “Monitoring the Implementation of Socio-economic Rights in South Africa: Some Lessons From the International Community” in *Law, Democracy & Development* Vol 8 2004 (2) 207.

<sup>572</sup> Engh “Developing Capacity to Realise Socio-Economic Rights. The Example of HIV/Aids and the Right to Food in South Africa” 4.

<sup>573</sup> Ntlama says that the state bears the primary duty for implementing court orders. The courts become involved again if the state has allegedly failed to comply with the order. Ntlama “Unlocking the Future: Monitoring Court Orders in Respect of Socio-Economic Rights” (2003) Constitutional Law and Legal



to food, if such a claim were to arise, is all the more challenging owing to the lack of precedent concerning this socio-economic right. Due to the lack of direct case authority concerning the right to food in South Africa, it is necessary to consider court decisions relating to other socio-economic rights and then to draw analogies with a possible constitutional challenge relating to the right to food. The final part of the chapter will consider socio-economic right enforcement through the South African Human Rights Commission.

The structure of the Chapter will be as follows: firstly, the rationale for the choice of cases analysed will be given. Secondly, each chosen case will be discussed in some detail in the form of mini-casenotes. The basic facts of each case will be given, the court's decision and *ratio decidendi*. Throughout the case discussions, the significance of the constitutional challenge and judgment to a possible right to food challenge will be highlighted. The Chapter will finish with the Human Rights Commission discussion. Constitutional jurisdiction of South African courts, access to court and *locus standi* were all canvassed in Chapter 2 and will therefore not be repeated in this Chapter.<sup>574</sup>

## 6.2 CASE ANALYSIS

### 6.2.1 RATIONALE FOR THE CHOICE OF CASES ANALYSED

My earlier discussion has shown that the content of socio-economic rights is sometimes not very clear. Ntlama argues that litigation is necessary to delineate the ambit of socio-economic rights.<sup>575</sup> The reason for not analysing cases dealing directly with the right to food is quite simply that no direct challenge relating to this right has been heard by our courts to date. However, there have been a few seminal Constitutional Court cases relating to other socio-economic rights which have commented a great deal on socio-economic rights generally. In chronological order the cases in question are: *Soobramoney v Minister of Health, KwaZulu-*

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Theory Conference (Unpublished Paper distributed at a conference held at the University of the Western Cape, September 2003).

<sup>574</sup> The case of *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC), which first discussed the justiciability of socio-economic rights will not be discussed. Instead cases which deal with specific socio-economic rights cases will be discussed as it was felt that these cases were of more relevance to a possible future right to food constitutional challenge.

<sup>575</sup> Ntlama "Unlocking the Future: Monitoring Court Orders in Respect of Socio- Economic Rights" 3.

*Natal*<sup>576</sup> concerning the right to emergency medical care; *Government of the Republic of South Africa and Others v Grootboom and Others*<sup>577</sup> relating to the provision of housing for the homeless; *Minister of Health and Others v Treatment Action Campaign and Others (1)*<sup>578</sup> dealing with the provision of health care and *Khosa and Others v Minister of Social Development and Others*; *Mahlaule and Another v Minister of Social Development and Others*<sup>579</sup> dealing with the right to social assistance. Govindjee correctly points out that these judicial pronouncements indicate how the Constitutional Court has interpreted section 27 of the Constitution within the broader constitutional framework.<sup>580</sup> These cases can be used to illustrate comparisons with the right to food and, in doing so, predict the way our courts are most likely to deal with issues relating to the right to food should they come before the courts. Brand indicates that these four key socio-economic rights judgments of the Constitutional Court have described the state's duties to fulfil socio-economic rights.<sup>581</sup> These cases are discussed chronologically in order to show the development in the decisions of the Constitutional Court over time. The clear justiciability of socio-economic rights, which was adequately covered in Chapter 2, and was accepted in a line of constitutional cases starting with the *Certification*<sup>582</sup> judgment, will not be repeated here.

## 6.2.2 CASE STUDIES

### 6.2.2.1 *SOOBRAMONEY v MINISTER OF HEALTH, KWAZULU-NATAL*<sup>583</sup>

#### 6.2.2.1.1 THE FACTS AND COURT DECISION

In this case the appellant, who suffered from chronic kidney problems and other health problems, was denied renal dialysis by a state hospital on the basis that there were insufficient dialysis machines to meet the demand. The hospital had in place guidelines for determining which patients would have the use of the machines due to the shortage. The appellant argued that his right to health care services in section 27(1)(a) of the Constitution,

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<sup>576</sup> 1997 (12) BCLR 1696 (CC).

<sup>577</sup> 2000 (11) BCLR 1169 (CC).

<sup>578</sup> 2002 (10) BCLR 1033 (CC).

<sup>579</sup> 2004 (6) BCLR 569 (CC).

<sup>580</sup> Govindjee *The Constitutional Right to Social Assistance as a Framework for Social Policy in South Africa: Lessons from India* 97.

<sup>581</sup> Brand "The Right to Food" in Brand and Heyns (eds) *Socio-Economic Rights in South Africa* 178.

<sup>582</sup> *Ex parte Chairman of the Constitutional Assembly: In re: Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC).

<sup>583</sup> 1997 (12) BCLR 1696 (CC).

his right not to be refused emergency medical treatment in section 27(3) and section 11, his right to life, were being unfairly denied to him in terms of the existing state policy. The appellant therefore sought a court order compelling the hospital to provide him with the dialysis treatment.<sup>584</sup>

The hospital's renal dialysis policy indicated that only those who qualified for a kidney transplant would receive dialysis until a transplant could be performed. To qualify for a kidney transplant patients needed to have no other major disease. Put simply, the policy provided for usage of the dialysis machines which would provide the greatest positive impact. It was common cause that the appellant did not meet this requirement due to, amongst other conditions, his chronic heart disease.<sup>585</sup> It was held that there was no suggestion made by the appellant that the policy had not been applied rationally or fairly in his case.<sup>586</sup>

The appellant argued that terminally ill patients should be provided with life prolonging treatment by the state as part of their section 27(3) rights. It was further submitted on behalf of the appellant that state resources needed to be provided to meet the obligation in section 27(3) in light of the right to life in section 11.<sup>587</sup>

The court found against the appellant by holding that the term "emergency medical treatment" did not encompass on-going chronic treatment as in the appellant's case. The court held further that section 27(3) should be read in light of the resource limitation provision in section 27(2). In the circumstances of this case the state did not have sufficient resources to provide renal dialysis to all those in need of it.<sup>588</sup> Moellendorf also correctly points out that the court regarded the right to life as an unsatisfactory way of justifying the right to life-sustaining medical care. Moellendorf cleverly explains the soundness of the court's reasoning in this regard by arguing that the right to life does not allow a sick patient the right to claim resources (in this case life sustaining medical care) to the detriment of someone else.<sup>589</sup>

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<sup>584</sup> *Soobramoney* paras 1 to 5.

<sup>585</sup> *Soobramoney* para 4. In addition the appellant's kidney failure was irreversible and hence he did not qualify in terms of the stated hospital policy.

<sup>586</sup> *Soobramoney* para 25.

<sup>587</sup> *Soobramoney* para 7.

<sup>588</sup> *Soobramoney* paras 11 to 13 and para 22.

<sup>589</sup> Moellendorf "Reasoning about Resources: *Soobramoney* and the Future of Socio-Economic Rights Claims" (1998) 14 *SAJHR* 327.

Having dismissed the appellant's claim in terms of section 27(3), the court had to consider the arguments in terms of section 27(1)(a) read with section 27(2). The court rejected the appellant's argument that the court should order the state to make extra money available for kidney dialysis. The court noted that a reasonable and fair policy had been put into place by the hospital to decide who would qualify for treatment. Significantly, by allocating the scarce resources (the dialysis machines) in terms of the policy more benefits were achieved for more patients than would be the case if the dialysis machines were used for patients like the appellant.<sup>590</sup>

Of critical importance to this analysis was the court's finding that it would be hesitant to interfere with rational decisions taken in good faith by the responsible state authorities in such matters. The court acknowledged that it was not in the best position to properly make policy decisions as to the allocation of scarce resources. A major factor in the court's reasoning was the great degree of interference in social and budgetary policies that would be caused by granting an order in favour of the appellant. The state has to manage the resources it has at its disposal in order to meet the constitutional socio-economic rights of as many people as possible. The court therefore found that the appellant's constitutional rights, the key one being that contained in section 27(3), had not been unfairly denied. The appeal therefore failed.<sup>591</sup>

From a humanitarian perspective, the difficulty in making the decision in *Soobramoney* was emphasised by the appellant dying soon after the judgment was handed down.<sup>592</sup> Furthermore, the disparity between rich and poor was highlighted by Justice Chaskalson:

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<sup>590</sup> *Soobramoney* paras 23 to 30. Scott and Alston indicate that the court accepted that a court order for funds to be reallocated to allow the appellant to receive treatment would have an impact at three levels:

- 1) All patients with the same illness would be entitled to the same claim.
- 2) Patients with other ailments requiring expensive treatment at state expense would have a similar entitlement.
- 3) There might be similar claims for reallocation of scarce resources in other areas such as housing and education. These authors thus imply that such a multiplier effect of an order in favour of the appellant mitigated against an order in his favour.

Scott & Alston "Adjudicating Constitutional Priorities in a Transnational Context: A Comment on *Soobramoney's* Legacy and *Grootboom's* Promise" 241.

<sup>591</sup> *Soobramoney* paras 28, 29, 36, 58 and 59.

<sup>592</sup> Mollendorf "Reasoning about Resources: *Soobramoney* and the Future of Socio-Economic Rights Claims" 327.

“the hard and unpalatable fact is that if [Mr Soobramoney] were a wealthy man he would be able to procure such treatment from private sources”.<sup>593</sup>

#### 6.2.21.2 SIGNIFICANCE OF *SOOBARAMONEY* TO THIS RESEARCH

At first glance it might appear as if the judgment in *Soobramoney* has very negative implications for a possible constitutional challenge by a hungry or malnourished person to their right to food. For example, Ntlama<sup>594</sup> describes as “shocking” Madlala J’s description of socio-economic rights as ideals which should be strived for.<sup>595</sup> Ntlama’s strong and justified criticism of these sentiments of Justice Madlala arise from the fact that the clear justiciability of socio-economic rights, which I have already discussed at length, appear to have been ignored by the learned judge in this case through his relegation of these rights to mere ideals. It will be submitted that whilst the judgment in *Soobramoney* raises some questions as to how a right to food challenge could be successfully brought to court, the decision simply indicates the parameters in which such a challenge would have to be made.

One of the obvious implications of *Soobramoney* is its indication of the court’s reluctance to blur the separation of powers doctrine through substituting its own view for that of a properly made executive decision. This view is apparent from the finding of Justice Chaskalson that:

“A court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters.”<sup>596</sup>

However, it is important to note that the court did not rule out its power to make such “executive-like” orders. In limiting the ambit in which it is likely to take on a policy-making function, the Constitutional Court in the *Soobramoney* decision is simply reiterating the general rule. Although the words “slow to interfere” do suggest a degree of judicial deference, the restraint which the court indicates the judiciary should show is merely relative to the primary role which the executive has in making policy decisions.<sup>597</sup> As was noted in Chapter 2 of this dissertation, in terms of the *Certification* judgment, our courts must sometimes move outside their usual boundaries in terms of the separation of powers doctrine

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<sup>593</sup> *Soobramoney* para 31.

<sup>594</sup> Ntlama “Unlocking the Future: Monitoring Court Orders in Respect of Socio- Economic Rights” 1.

<sup>595</sup> Justice Madlala’s controversial description of socio-economic is found at paragraph 42 of the judgment.

<sup>596</sup> *Soobramoney* para 29.

<sup>597</sup> Scott & Alston “Adjudicating Constitutional Priorities in a Transnational Context: A Comment on *Soobramoney*’s Legacy and *Grootboom*’s Promise” 241.

to decide issues which usually fall within the sphere of other government branches.<sup>598</sup> *August v Electoral Commission*<sup>599</sup> clearly illustrates the willingness of our courts to dictate government spending when necessary.<sup>600</sup> In relation to a hypothetical constitutional challenge on the right to food, it is in any event submitted that the understandable hesitancy of the courts, implicit in the *Soobramoney* decision, to interfere with an existing executive policy does not come into play because there exists no analogous policy (to renal dialysis treatment) in relation to state allocation of food. Furthermore, it is difficult to conceive of any situation where someone in need of food could legitimately be denied that food in favour of another person. It is therefore submitted that the right to food is distinguishable from a *Soobramoney*-type challenge in this regard.

The *Soobramoney* decision is of clear relevance to a right to food claim in so far as the case highlights that the socio-economic rights in section 27(1) and 27(3) are subject to the caveats of “progressive realisation” and “available resources”.<sup>601</sup> However, it is submitted that this finding of the court is merely a restatement of the provisions of section 27 and takes the matter no further. It is not argued that everyone in South Africa is immediately entitled to food. As will be seen in the discussion of later cases, most specifically in *Grootboom*, the Constitutional Court has rejected the idea of an entitlement to a minimum core of rights.<sup>602</sup> It is argued that the right to adequate food in section 27(1) as qualified by section 27(2) should be read to mean that the state must put into place reasonable policies to ensure that no one in this country should suffer from serious malnutrition or die of hunger. This argument is even stronger in relation to the nutrition rights of children in section 28(1)(c) in that these rights

<sup>598</sup> *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*, 1996 1996 (10) BCLR 1253 (CC) at para 78.

<sup>599</sup> 1999 (3) BCLR 1 (CC). Although this decision related to a civil and political right, it is submitted that its rationale is applicable to socio-economic rights like the right to food. See the quote from former president Nelson Mandela at the outset of the Introductory Chapter wherein he calls for both freedom and bread at the same time. I refer back to the quote in this context to argue that because such rights (civil-political and socio-economic) are of equal importance, the need for courts to ensure that there is adequate spending on food is as important as a right like voting.

<sup>600</sup> This aspect of the *August v Electoral Commission* decision is supported in the words of Scott and Alston who say:

“Coping with the budgetary implications of constitutional priorities is one of the central responsibilities of Parliament and the executive, and the courts stay well within their constitutionally mandated role if they adjudicate, as best they can, on matters of principle and allow budgetary implications to be factored into the fashioning of remedies.”

Scott & Alston “Adjudicating Constitutional Priorities in a Transnational Context: A Comment on *Soobramoney*’s Legacy and *Grootboom*’s Promise” 253 to 254.

<sup>601</sup> *Soobramoney* paras 11 to 13 and para 22.

<sup>602</sup> *Grootboom* para 33.

are not qualified by internal limitations. In support of this submission it is noted that the *Soobramoney* judgment held that despite the difficulties of providing socio-economic rights, the state is required by the Constitution to meet its section 27 obligations.<sup>603</sup>

Moellendorf raises the view that Justices Chaskalson and Madala use the concept of “available resources” in its narrowest sense to mean the resources allocated to a particular department.<sup>604</sup> However, this part of the judgment should be balanced against Chaskalson P’s finding that the state has to manage its limited resources to meet a wide range of needs, necessitating at times a holistic approach to the needs of society as a whole.<sup>605</sup> The last-mentioned part of the judgment could be understood to imply the possibility of a court enquiry into the reasonableness of budgetary allocations in instances where core service provisions were unreasonably denied in budgetary allocations. Moellendorf’s argument does raise a legitimate concern in that if correct, when applied to the right to food, would mean that the Department of Social Welfare could avoid feeding people on the basis of having been granted an insufficient budget to do so.<sup>606</sup> However, it is still submitted that a broader conception of “available resources” is the correct one. In other words, “available resources” are the resources which could reasonably be allocated to the department in question.<sup>607</sup> If the latter submission is correct, it would make a constitutional claim to the right to food against the appropriate state department(s) far easier.

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<sup>603</sup> *Soobramoney* para 36. However, to be balanced against the court’s acknowledgement of the state’s s 27 obligations, Scott and Alston find it bemusing that the court did not even consider, let alone look into whether they had been satisfied of minimum core obligations. Scott & Alston “Adjudicating Constitutional Priorities in a Transnational Context: A Comment on *Soobramoney*’s Legacy and *Grootboom*’s Promise” 251.

<sup>604</sup> Moellendorf “Reasoning about Resources: *Soobramoney* and the Future of Socio-Economic Rights Claims” 330, 332 and 333. In this regard he cites paragraphs 24 and 28 of the *Soobramoney* judgment in support of his interpretation of the decision. Moellendorf concedes that a broader conception of “available resources” would not have resulted in a different result for Mr Soobramoney. However, his concern relates to the narrow conception of the term in so far as it might apply to the enforcement of more attainable socio-economic rights, like the right to food.

<sup>605</sup> *Soobramoney* para 31.

<sup>606</sup> In relation to budgeting issues, Scott and Alston indicate that the court could have intervened in budgeting issues in one of two ways: either through increasing the health budget or through re-prioritising within the health budget. Scott & Alston “Adjudicating Constitutional Priorities in a Transnational Context: A Comment on *Soobramoney*’s Legacy and *Grootboom*’s Promise” 240. It has already been shown that the court regarded itself as the inappropriate body to make such budgetary allocations. Later in the same article, Scott and Alston argue that constitutional adjudication on positive obligations will always put pressure on the state to find the necessary resources, from within existing budgets or by raising more money (the latter normally through taxes). Scott & Alston “Adjudicating Constitutional Priorities in a Transnational Context: A Comment on *Soobramoney*’s Legacy and *Grootboom*’s Promise” 253.

<sup>607</sup> See footnotes 35 and 36 in Chapter 2 and the discussion related thereto.

Another factor of significance in relation to the progressive realisation of rights is the date when the *Soobramoney* case was decided. This case went to court just over a year after the 1996 Constitution came into effect.<sup>608</sup> There had thus been a relatively short period of time for government to progressively realise the right to health care. This fact is emphasised by the court's finding that:

“Given this lack of resources and the significant demands on them that have already been referred to, an unqualified obligation to meet these needs would not *presently* be capable of being fulfilled.”<sup>609</sup> (own emphasis added)

Now that the state has had over a decade (since the 1996 Constitution came into effect) to progressively realise section 27 rights, it is submitted that there would be less room for the state to escape its constitutional duty to ensure that adequate programmes are in place to ensure that everyone is sufficiently fed.

A similar line of argument for submitting that a right to food claim would not be negatively affected by the *Soobramoney* precedent relates to the court having indicated that its decision would have been different had the necessary dialysis treatment been available but denied.<sup>610</sup> Thus provided that there are sufficient state resources available to adequately feed everyone in South Africa, then the *Soobramoney* judgment is actually authority supporting provision of adequate food. Research cited in Chapter 3 indicates that food shortages and malnutrition in South Africa are due to problems of uneven allocation of resources rather than a lack thereof.<sup>611</sup>

Scott and Alston regard as worrying the apparent conflation of section 27(1) with section 27(2) in *Soobramoney*.<sup>612</sup> In other words, they see the court as having inadequately examined the requirements of section 27(1), as read with the need to respect, protect, promote and fulfil rights in the Bill of Rights (as section 7(2) requires), in its haste to stress that that the socio-economic rights in section 27(1) are subject to the limitations of section 27(2). The authors

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<sup>608</sup> Scott & Alston “Adjudicating Constitutional Priorities in a Transnational Context: A Comment on *Soobramoney*’s Legacy and *Grootboom*’s Promise” 243.

<sup>609</sup> *Soobramoney* para 11.

<sup>610</sup> *Soobramoney* para 18.

<sup>611</sup> Mubangizi *The Protection of Human Rights in South Africa: A Legal and Practical Guide* 137.

<sup>612</sup> Scott & Alston “Adjudicating Constitutional Priorities in a Transnational Context: A Comment on *Soobramoney*’s Legacy and *Grootboom*’s Promise” 249.



see this as a potential relegation of section 27(1) to a mere definitional role. In light of my lengthy discussion in Chapter 3 of the proposed requirements of respecting, protecting, promoting and fulfilling the right to food, I would argue that it is wrong to relegate section 27(1) to a purely definitional role. Thus in the context of a right to food challenge, although subject to the internal limitations of section 27(2), a court would need to consider the requirements of the provision of sufficient food in section 27(1)(b) in light of the section 7(2) requirements.

Liebenberg highlights the significance of the *Soobramoney* judgment opting for a reasonableness review on the basis of a standard of rationality.<sup>613</sup> In relation to this test, the state is given a wide discretion in terms of budgetary allocations. This would obviously apply to any state budgetary allocations in terms of food provision. For example, an applicant would not be successful in arguing that more money should be spent by the state in order to improve the variety of food provided. The only requirement is that the food provided would need to be adequate.

Liebenberg<sup>614</sup> warns that the *Soobramoney* judgment provides very little guidance on the standard of the rationality review to be applied and in what particular circumstances the court would intervene.<sup>615</sup> If Liebenberg is correct in this assertion, the need to consider other cases dealing with socio-economic right provision is obvious. It is worth noting that our courts have on numerous occasions given much clearer guidance concerning the implementation of civil and political rights.<sup>616</sup> Ntlama calls for our courts to provide equally clear guidelines for the implementation of socio-economic rights, as there is no basis drawn in the Constitution for these rights to be dealt with differently (and more vaguely) than civil and political

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<sup>613</sup> Liebenberg “The Interpretation of Socio-Economic Rights” in Chaskalson; Kentridge; Klaaren; Marcus; Spitz and Woolman (eds) *Constitutional Law of South Africa* (2004) 2<sup>nd</sup> ed 33-32.

<sup>614</sup> Liebenberg “The Interpretation of Socio-Economic Rights” in Chaskalson; Kentridge; Klaaren; Marcus; Spitz and Woolman (eds) *Constitutional Law of South Africa* 33-33.

<sup>615</sup> See also Scott and Alston “Adjudicating Constitutional Priorities in a Transnational Context: A Comment on *Soobramoney*’s Legacy and *Grootboom*’s Promise” 206 and 242 wherein the authors argue that whilst the decision in *Soobramoney* was correct, its reasoning was poor in various respects and therefore it does not serve as a very helpful precedent. They indicate that the *Soobramoney* decision requires the legislature and executive to have acted in good faith. Scott and Alston interpret this good faith requirement broadly to require that the legislative and executive purposes in question align with a sincere commitment to realising the rights in the Bill of Rights.

<sup>616</sup> For example, in *Hoffman v South African Airways* 2000 (11) BCLR 1211 (CC) the CC ordered the instatement of someone denied work due to being HIV-positive. Significantly, the court indicated how the Respondent’s compliance would be monitored. Another example is *Strydom v Minister of Correctional Services* 1999 (3) BCLR 342 (W), in relation to failure to provide prisoners with electricity, where the court gave a time-period for a report to be provided to the court.

rights.<sup>617</sup> On the basis of the interdependence and interrelatedness of civil and political rights with socio-economic rights (discussed in previous chapters), it is submitted that Ntlama is correct in his appeal for this approach to be adopted by our courts.

It has already been noted that the court in *Soobramoney* was hesitant to unduly interfere with the executive's task of creating policy and budgets. The court was concerned that a ruling in favour of the appellant would result in various other claims to expensive medical treatment.<sup>618</sup> Such multiple claims would require budgetary alterations to the prejudice of other needs the state must meet. A very difficult choice was made that Mr Soobramoney's claim to life-prolonging dialysis was disproportionate to the drain on state resources which his treatment would have entailed. This reflects a clear utilitarian ideal: the greatest good for the greatest number should be promoted.<sup>619</sup> However, I submit that a court award in favour of the right to food is unlikely to have equally expensive ramifications to the prejudice of other types of service delivery. The treatment sought by Mr Soobramoney was very expensive, quite unlike the provision of the most basic of foodstuffs. Furthermore, I cannot conceive that a denial of certain people sufficient food could ever be in accordance with the principle of utilitarianism. This type of necessary trade-off between competing interests Scott and Alston term "principled normative trade-offs".<sup>620</sup> By way of a different example, invariably the right to free speech is restricted to some degree by the privacy rights of others and vice-versa. Whilst fully accepting the need to balance rights, which clearly form the basis for Mr Soobramoney failing in his application,<sup>621</sup> it is argued that there would be no acceptable trade-off *vis-a-vis* food rights. In other words, there is no analogous reason to deny anyone the right to food, unlike the case of *Soobramoney* where an order in favour of the appellant would have invariably led to suffering for someone else or others.

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<sup>617</sup> Ntlama "Unlocking the Future: Monitoring Court Orders in Respect of Socio- Economic Rights" (2003) 8.

<sup>618</sup> *Soobramoney* para 28.

<sup>619</sup> Scott and Alston highlight that the kidney dialysis machine allocation policy in place as opposed to an order in favour of Mr Soobramoney was beneficial both in terms of the number of persons able to benefit and the quality of the benefit. Scott and Alston "Adjudicating Constitutional Priorities in a Transnational Context: A Comment on *Soobramoney's* Legacy and *Grootboom's* Promise" 243.

<sup>620</sup> Scott & Alston "Adjudicating Constitutional Priorities in a Transnational Context: A Comment on *Soobramoney's* Legacy and *Grootboom's* Promise" 219 and 238. Scott and Alston note that the court did not interpret s 27(3) too generously due to the aforementioned trade-offs between rights of different people to health care.

<sup>621</sup> Because dialysis for him would result in shortfalls for others.

As an aside, it is apparent from *Soobramoney* that cases concerning socio-economic rights allocation are difficult and frequently emotive.<sup>622</sup> However, it is also clear that a successful constitutional challenge requires a clear legal basis. It will therefore not suffice to base a court challenge on the right to food upon compassionate grounds.

In concluding this discussion of *Soobramoney*, it is perhaps useful to note Scott and Alston's view that the case should be seen as merely an initial step in socio-economic rights jurisprudence. They make this submission on the basis that the case failed to consider international law and was considered and decided upon as a matter of great urgency.<sup>623</sup>

### **6.2.2.2 GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS v GROOTBOOM AND OTHERS<sup>624</sup>**

#### **6.2.2.2.1 THE FACTS AND COURT DECISION<sup>625</sup>**

The appellants in this case represented local, provincial and national government responsible for housing in the Cape Metropolitan Council (Cape Metro.). They challenged findings of the Cape Provincial Division<sup>626</sup> ordering them to provide the respondents, who were children (together with their parents), with adequate basic shelter or housing until they obtained permanent accommodation.<sup>627</sup>

The respondents' original claim was based on an alleged denial of their constitutional rights to housing in terms of section 26 and the rights of children in terms of section 28 (1)(c) to shelter.<sup>628</sup> Section 26 provides that everyone has the right of access to adequate housing and

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<sup>622</sup> See in particular *Soobramoney* paras 52 and 59, as well as the compassion implicit in the judgment as a whole.

<sup>623</sup> Scott and Alston "Adjudicating Constitutional Priorities in a Transnational Context: A Comment on *Soobramoney's* Legacy and *Grootboom's* Promise" 208. Clearly the rush, and by implication perhaps the dearth of international authority in the judgments, can be attributed to the appellant's fast failing health; the decision had to be reached very quickly.

<sup>624</sup> 2000 (11) BCLR 1169 (CC). Hereinafter referred to as *Grootboom*.

<sup>625</sup> This analysis will focus only on those facts and parts of the court order of particular relevance to this study.

<sup>626</sup> The provincial division decision is reported at *Grootboom v Oostenberg Municipality and Others* 2000 (3) BCLR 277 (C). An urgent application was made to the High Court praying that the applicants be provided adequate basic shelter or housing until they received permanent accommodation.

<sup>627</sup> The Respondents were 900 homeless men, women and children who had been evicted from land where they were living illegally. *Grootboom* paras 3 to 4.

<sup>628</sup> *Grootboom* para 12.

imposes an obligation upon the state to take reasonable legislative and other measures to ensure the progressive realisation of this right within its available resources.

The Constitutional Court judgment of Justice Yacoob outlines the reasoning of the Cape Provincial Division, considers the nature of the right of access to adequate housing in section 26 and its application and evaluates whether the state was meeting its section 26 obligations. Finally, the section 28 rights of children to shelter is considered. In this brief analysis of the judgment, I will mainly focus on the court's interpretation of the right to housing and the state's obligations in terms of the section. I will touch briefly on the court's rejection of the applicability of the section 28 arguments. These aspects are considered due to analogies which can be drawn between these rights and the right to food in sections 27 and 28 of the Constitution.

The court accepted the clear justiciability of socio-economic rights in our Constitution. The only question to be answered was how to enforce such rights; in this case, the right to housing.<sup>629</sup> The court held that section 26(2) of the Constitution requires the state to devise and progressively implement, within its available resources, a comprehensive and co-ordinated programme to realise the right of access to adequate housing.<sup>630</sup> The court noted that the measures adopted by the state must be reasonably able to meet the aims of the right in question.<sup>631</sup> A key issue related to the need to provide assistance for those with no access to land or roofs over their heads, and who were living in intolerable or crisis conditions. The court decided that the state was not meeting its section 26 obligations in that the housing programme in the Cape Metro. did not make reasonable provision, within its resources, for this most vulnerable group of people just mentioned.<sup>632</sup>

The right of access to adequate housing was considered in relation to other related socio-economic rights and the Constitution as a whole. The court found that the state was constitutionally bound to take positive steps to meet the urgent needs of those living in abject poverty, homelessness or inadequate housing.<sup>633</sup>

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<sup>629</sup> *Grootboom* para 20.

<sup>630</sup> These requirements were taken virtually straight from s 26 by the court. *Grootboom* para 21.

<sup>631</sup> *Grootboom* para 41.

<sup>632</sup> *Grootboom* para 52.

<sup>633</sup> *Grootboom* para 24.

The court found that the right to adequate housing in section 26(1) should be read together with the requirements of section 26(2), including the need to take reasonable legislative and other measures to realise the right. In attempting to interpret the obligations imposed by the right, the court found that there was, at the very least, a negative duty on the state and all others not to prevent or prejudice the right of access to adequate housing. This negative right was found to be emphasised by the prohibition of arbitrary evictions in section 26(3). The court decided that adequate housing entails land upon which a structure is built, the structure itself and municipal servicing of the land and dwelling.<sup>634</sup>

In relation to positive obligations, the court decided that responsibility for access to adequate housing rests with the state and private bodies, including individuals themselves, but such involvement requires enabling legislative and other measures. The state had to create the conditions for access to adequate housing for people in all income-brackets. For those able to afford adequate housing, the state was still found to have obligations in facilitating the logistics for purchasing or building such houses. For those unable to afford adequate housing, the court looked closely at the relationship between the right to housing in section 26 and the right to social security and social assistance in section 27.<sup>635</sup> In Chapter 3 I indicated the logic for the link between social security (including social assistance) and other socio-economic rights: the provision of adequate social security facilitates easier individual access to things like housing and food.

An important aspect of the judgment is the breaking down of the different requirements of section 26(2): what reasonable legislative and other measures mean, as well as the internal limitations of progressive realisation and resource limitations. A reasonable programme, it was held, has to carefully allocate tasks to different levels of government and provide adequate money and people to do the jobs. Furthermore, co-operation is required between the different government levels, with commitment from all government levels. The court, however, identifies national government as bearing overall responsibility for the programme and highlights the important need for it to equitably allocate budgets.<sup>636</sup>

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<sup>634</sup> *Grootboom* paras 34 to 35.

<sup>635</sup> *Grootboom* paras 35 to 36.

<sup>636</sup> *Grootboom* paras 39 to 40.

In relation to the court's analysis of the measures to be taken to realise access to adequate housing, the court can be said to have taken a middle path between the apparent judicial conservatism of *Soobramoney* and a directly interventionist approach. The court decided that measures have to create a coherent public housing programme with the aim of and potential for progressive realisation of the right of access to adequate housing within the state's resource limitations. Provided the measures are reasonable, *Grootboom* held that it is the task of the legislative and executive branches of government to indicate the exact nature of the measures. If the measures are reasonable, the court will not interfere.<sup>637</sup>

The court then had to determine the reasonableness of the measures taken by the state at various levels. The Constitutional Court did not look to second-guess whether another or other measures could have done the job better, including spending money differently. The court rather looked at the measures that had been adopted and enquired as to whether they were objectively reasonable. In order to be reasonable, the state was held to have a duty to act to achieve the planned result, and the legislative measures require support of suitable, well-directed executive policies and programmes. These policies and programmes had to be reasonable both in their formulation and roll-out. Significantly for this research, *Grootboom* held that a programme that excluded a significant segment of society could not be said to be reasonable. Furthermore, if the measures, though statistically successful, ignored the needs of those in most need, they might not be regarded as reasonable.<sup>638</sup>

The internal limitation of "progressive realization" was interpreted as requiring an improvement of access to housing over time through the minimising of legal, administrative and financial obstacles over time. The Constitutional Court decided that the concept of progressive realisation requires the state to move as:

"expeditiously and effectively as possible towards the goal".<sup>639</sup>

The court held that "within available resources" means that what the state had to do, the timeframe therefore and the reasonableness of the measures were all to be measured against the barometer of the resources available for the task.<sup>640</sup>

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<sup>637</sup> *Grootboom* para 41.

<sup>638</sup> *Grootboom* paras 42 to 44.

<sup>639</sup> *Grootboom* para 45.

Having provided its interpretation of section 26's requirements, the court then analysed whether the state had met these obligations. The Appellants were able to show the legislative and other measures they had adopted.<sup>641</sup> The court began by noting the significant achievements achieved by the state in terms of the programme through significant expenditure and the building of a number of houses; this indicated an organised response to a clear need. The programme was also held to have the aim of progressive realisation of the right. In attempting to answer whether the measures were reasonable, the court was happy with the allocation of state responsibilities and functions. The programme applied country-wide and solutions for difficulties in particular areas were being sought.<sup>642</sup>

The court had to determine whether the nationwide housing programme was flexible enough to deal with people in desperate need and to meet other urgent needs.<sup>643</sup> In other words, the medium- and long-term aspects of the housing programme were held to be perfectly acceptable, the only issue related to short-term measures for people like the Respondents in crisis situations. The national housing programme did not have in place short-term housing measures for people in desperate need. The measures in place failed to provide temporary relief for people without access to land and shelter, people living in intolerable conditions and for people in crisis because of natural disasters, or because their homes were threatened with demolition. The question which then needed to be answered was whether such a gap in the programme could be considered reasonable within the parameters of section 26.<sup>644</sup> The Appellants raised a similar argument to that accepted in *Soobramoney* for denial of a right, namely that ordering provision for this category would unacceptably hamper the policy as a whole. The court rejected this argument of the appellants by holding that provision for those in desperate need formed an intrinsic part of the state's duty in terms of section 26. In coming to this finding the court indicated the need for a reasonable budgetary allocation for this category of housing need.<sup>645</sup>

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<sup>640</sup> *Grootboom* para 46.

<sup>641</sup> The state housing programme provided for the progressive realisation of access to formal housing, to be accessed via a waiting list. *In casu*, some had been on the waiting list for up to seven years. *Grootboom* para 8.

<sup>642</sup> *Grootboom* paras 47 and 50.

<sup>643</sup> *Grootboom* para 56.

<sup>644</sup> *Grootboom* para 63.

<sup>645</sup> *Grootboom* paras 64 to 66.

The court then had to apply its collective mind to the housing programme in place in the Cape Metro. and specifically the Oostenberg Municipality where the Respondents lived. The court decided that a mere programme does not suffice without the requisite steps being taken to start and continue the programme, especially considering the urgency of the housing situation faced by those in the position of the Respondents. Effectual execution of the policy required an adequate national government budgetary allocation- which as has already been said, was lacking. The court found that allied with the need to recognise immediate needs at the national level of the housing programme came the need to plan, budget and monitor the implementation of these crisis-situation policies. This enforcement aspect, requiring intra-governmental co-operation, had to ensure that a significant number of those in such a crisis situation were in fact benefiting in terms of the implementation of the policy.<sup>646</sup>

The Constitutional Court rejected the court *a quo*'s reasoning that the respondents, many of whom were children, and by virtue of the rights of these children, their parents, had to be housed by the state in terms of section 28(1)(c). The court came to this decision on the basis that the children were in the care of their parents, not the state.<sup>647</sup>

The Constitutional Court issued a declaratory order requiring the state to meet its section 26(2) obligations, specifically to create, fund, put into practice and supervise measures to assist those in desperate need. Significantly, the court held that there was no right to housing or shelter immediately on demand. Instead section 26 requires a reasonable programme to be in place and implemented.<sup>648</sup> The problem with the existing programme in the Cape Metro. was its failure to assist those in desperate need of housing.<sup>649</sup>

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<sup>646</sup> *Grootboom* paras 67 to 69.

<sup>647</sup> *Grootboom* para 77.

<sup>648</sup> The court described such a reasonable programme as:  
“coherent and co-ordinated”.

*Grootboom* para 95.

<sup>649</sup> *Grootboom* paras 95 and 96.



#### 6.2.2.2.2 SIGNIFICANCE OF *GROOTBOOM* TO THIS RESEARCH

*Grootboom* has been described as the Constitutional Court's most significant case dealing with the enforcement of socio-economic rights.<sup>650</sup> In respect of the implementation of socio-economic rights, *Grootboom* has been described as laying the foundations for the Constitutional Court's future adjudication of socio-economic rights.<sup>651</sup> De Vos sees *Grootboom* as showing a notable new commitment to seeking methods to enforce socio-economic rights.<sup>652</sup> Liebenberg describes *Grootboom* as an encouraging precedent for the enforcement of socio-economic rights, particularly those in sections 26 and 27, by the courts.<sup>653</sup> The status of *Grootboom* as a benchmark in South African socio-economic rights jurisprudence is reflected in its moving away from the narrow approach evident in the earlier *Soobramoney* judgment and the adoption of much of its reasoning in the later *TAC* and *Khosa* cases.<sup>654</sup> The clear relevance of the *Grootboom* case to this research into the right to food should be evident in that the wording of section 26(1) and (2) dealing with the right to housing, subject to internal limitations, is almost identical to the right to sufficient food in section 27(1)(b) subject to the internal limitations of section 27(2). Furthermore, the section 28(c) rights of children include both adequate shelter and nutrition. Hence the *Grootboom* case warrants very careful analysis.

Wesson views as a key aspect of the *Grootboom* decision, an attempt by the court to protect the needs of vulnerable groups in society, whilst leaving the co-ordination of socio-economic programmes mainly in the hands of the state.<sup>655</sup> This opinion is supported by the *Grootboom* judgment's indication that the nationwide housing programme fell short of the national government's duties in not recognising the obligation to provide assistance for those in

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<sup>650</sup> Wesson "Grootboom and Beyond: Reassessing the Socio-economic Jurisprudence of the South African Constitutional Court" (2004) Vol 20 Part 2 *SAJHR* 285.

<sup>651</sup> Wesson "Grootboom and Beyond: Reassessing the Socio-economic Jurisprudence of the South African Constitutional Court" 284 - 285.

<sup>652</sup> De Vos "Grootboom. The Right of Access to Housing and Substantive Equality as Contextual Fairness" (2001) Vol 17 *SAJHR* 259.

<sup>653</sup> Liebenberg "The Right to Social Assistance: The Implications of *Grootboom* for Policy Reform in South Africa" 232.

<sup>654</sup> Wesson "Grootboom and Beyond: Reassessing the Socio-economic Jurisprudence of the South African Constitutional Court" 284.

<sup>655</sup> Wesson "Grootboom and Beyond: Reassessing the Socio-economic Jurisprudence of the South African Constitutional Court" 285.

desperate need.<sup>656</sup> De Vos interprets this part of the decision as recognising the transformative aim of the Constitution which, in his view, sometimes obliges the state to speed up transformation. Where the state unreasonably fails to meet the socio-economic needs of the most vulnerable sectors of society, De Vos argues that such state action or omission is likely to amount to unfair discrimination.<sup>657</sup> The protection of vulnerable groups principle is of clear relevance to the right to food in that the hungry and malnourished are unquestionably one of the most defenceless groups in society. In a similar vein, Chetty submits that policies that are not comprehensive and exclude children and/ or considerable numbers of people in desperate need are unlikely to comply with the requirements of section 27.<sup>658</sup>

De Vos argues that the *Grootboom* decision reflects that the Constitution is underpinned by the need to achieve substantive equality in South Africa.<sup>659</sup> Along these lines he sees the Constitution as an instrument of transformation towards a society where people live in dignity and without poverty, hunger and disease. In order to achieve such a society De Vos indicates that *Grootboom* highlights the need to consider constitutional rights within the prevailing social and economic context.<sup>660</sup> De Vos's argument, which is framed within the context of the vulnerable group of Respondents in *Grootboom* (who were vulnerable because of their lack of housing), is, it is submitted, equally applicable to those whose susceptibility stems from a lack of adequate food. The prevailing socio-economic position in South Africa is clearly one of gross inequality which begs the courts to ensure that there is a move towards a more equitable society.

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<sup>656</sup> *Grootboom* para 66. The court highlighted the needs of vulnerable groups in various other parts of the judgment too. For example, the court found that the state was constitutionally bound to take positive steps to meet the urgent needs of those living in abject poverty, homelessness or inadequate housing. *Grootboom* para 24. Furthermore, the court held that statistically successful measures which ignored those most in need might not be regarded as reasonable. *Grootboom*, para 44.

<sup>657</sup> De Vos "Grootboom. The Right of Access to Housing and Substantive Equality as Contextual Fairness" 262, 270 and 271.

<sup>658</sup> Chetty "The Public Finance Implications of Recent Socio-economic Rights Judgments" (2002) Vol 6 No 2 *Law, Democracy and Development* 244.

<sup>659</sup> De Vos contends that the achievement of what he terms "contextual fairness" lies at the centre of the Constitutional Court's equality jurisprudence. De Vos "Grootboom. The Right of Access to Housing and Substantive Equality as Contextual Fairness" 275.

<sup>660</sup> De Vos "Grootboom. The Right of Access to Housing and Substantive Equality as Contextual Fairness" 268.

The court in *Grootboom*<sup>661</sup> identified its role as ensuring the reasonableness, broadly construed, of the state action.<sup>662</sup> The court noted that the measures adopted by the state must be reasonably able to meet the aims of the right in question.<sup>663</sup> The court held that a programme excluding a major sector of society cannot be regarded as reasonable.<sup>664</sup> In order to be reasonable, the state was held to have a duty to act in order to achieve the planned result, and the legislative measures require support of suitable, well-directed executive policies and programmes.<sup>665</sup> Wesson contends that at the heart of the *Grootboom* case lay the need to decide what the obligation to take reasonable legislative and other measures entailed, within the available state resources, to realise a particular socio-economic right.<sup>666</sup> The policies and programmes had to be reasonable both in their formulation and roll-out. Liebenberg welcomes the court's emphasis on the duty to reasonably implement laws and policies. She argues that whilst there has been logical enthusiasm for policy and legislative development, even the most inventive programmes will fail without adequate institutional capacity and resources to properly deliver services.<sup>667</sup> In the analogous right to food, this part of the *Grootboom* decision requires both reasonable feeding scheme policies and other food provision mechanisms for those in need, as well as adequate measures to ensure the proper implementation of the policy. The Constitutional Court has thus moved from the mere rationality enquiry of *Soobramoney* to the more probing reasonableness enquiry of *Grootboom*. The reasonableness enquiry, it is submitted, is more likely to result in a satisfactory interpretation of the state's socio-economic rights obligations.<sup>668</sup>

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<sup>661</sup> *Grootboom* para 41.

<sup>662</sup> Liebenberg regards the reasonableness test as the main test in *Grootboom* as to whether the state is fulfilling its positive socio-economic rights obligations. Liebenberg "The Right to Social Assistance: The Implications of *Grootboom* for Policy Reform in South Africa" 241.

<sup>663</sup> *Grootboom* para 41.

<sup>664</sup> *Grootboom* para 68.

<sup>665</sup> *Grootboom* para 44.

<sup>666</sup> Wesson "Grootboom and Beyond: Reassessing the Socio-economic Jurisprudence of the South African Constitutional Court" 287.

<sup>667</sup> Liebenberg "The Right to Social Assistance: The Implications of *Grootboom* for Policy Reform in South Africa" 242 and 244 to 246. Liebenberg provides a practical illustration of the severe consequences of the failed implementation of a state programme. On the basis of a cited case study, she indicates the severe, life-threatening, results of inadequate implementation of state social grants in the Mount Frere District of the Eastern Cape. The cited case study showed severe malnutrition amongst children due to the implementation problems.

<sup>668</sup> It may be asked why the Constitutional Court in *Soobramoney* was satisfied that Mr Soobramoney could legitimately be denied kidney dialysis, yet the state was failing in its obligations to the Respondents in *Grootboom*? De Vos provides a clear distinction between the facts of the two cases and compelling argues that the factual differences warrant the conflicting decisions. In *Soobramoney* the Appellant sought very expensive medical treatment when many others in the province and country did not even have access to adequate basic health care. By contrast, the Respondents in *Grootboom* were a very

Brand discusses various other aspects of the *Grootboom* judgment which are indicators of whether the state's measures to fulfil a particular right can be considered reasonable.<sup>669</sup> For example, the state measures must be comprehensive and co-ordinated in terms of allocation of duties within government structures with available resources allocated.<sup>670</sup> The measures must be able to adapt to changing needs and capable of responding to both short-term crises and longer term needs.<sup>671</sup> Also according to the judgment, to be classed as reasonable, state measures to fulfil the right must not ignore a significant part of society.<sup>672</sup> These aspects often mirror the requirements of international law (discussed in Chapter 3) and are of clear applicability to the right to food. In applying these requirements to the measures implemented by the state in relation to the right to food (discussed in Chapter 5), it is apparent that notwithstanding the somewhat more structured approach of the IFSS, there remains a lack of a clear, co-ordinated government response to the food challenges faced and greater human and financial resources need to be invested in the state's response to the challenges. The lack of emergency feeding for those in crisis situations has already been stressed as a major oversight in the state's right to food strategy and the fairly extensive hunger and malnutrition in much of South Africa is evidence that the existing approaches can be said to ignore a significant part of society.

Whilst the previous paragraphs have highlighted the positive implications of *Grootboom*'s reasonableness requirements, it should be noted that the judgment has come in for severe criticism in relation to the actual enforcement of its decision.<sup>673</sup> Wesson, for example, argues

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vulnerable group of homeless people who sought inclusion in the state housing programme. According to De Vos, in terms of its transformative approach to the Constitution, it was therefore logical for the Constitutional Court to have denied Mr Soobramoney's claim, yet accept that of the Respondents in *Grootboom*. De Vos "Grootboom. The Right of Access to Housing and Substantive Equality as Contextual Fairness" 260. Wesson provides a related basis for distinguishing between the cases. He argues that merely being vulnerable or unable to meet one's needs does not give a group an automatic claim to public resources. Instead, the court needs to establish whether the group has a reasonable claim to inclusion in a socio-economic rights programme from which others already benefit. Wesson "Grootboom and Beyond: Reassessing the Socio-economic Jurisprudence of the South African Constitutional Court" 293.

<sup>669</sup> Brand "The Right to Food" in Brand and Heyns (eds) *Socio-Economic Rights in South Africa* 179.

<sup>670</sup> *Grootboom* para 39.

<sup>671</sup> *Grootboom* para 43.

<sup>672</sup> *Ibid.*

<sup>673</sup> Wesson describes this crucial shortfall as a failure by the court to exercise supervisory jurisdiction. Wesson "Grootboom and Beyond: Reassessing the Socio-economic Jurisprudence of the South African Constitutional Court" 286.

that the problem with *Grootboom* is not the judgment but the lack of enforcement thereof.<sup>674</sup> The court indicated that the state had fallen short of its section 26 obligations and ordered the state to remedy the situation. Crucially, however, it failed to set up satisfactory means to ensure that the remedial state action was satisfactory.<sup>675</sup> Whilst the SAHRC was given the responsibility of supervising the implementation of the order and did file a report to the court, it had not received adequate information concerning the implementation of the order nationwide.<sup>676</sup> There was therefore, in effect, no adequate follow-up to ensure state compliance with the order. This gap in the effectiveness of the judgment is reflected in the fact that a full two years after the Constitutional Court's judgment in *Grootboom*, there remained substantial non-compliance by the state.<sup>677</sup> The failure by the court to exercise supervisory jurisdiction is a glaring gap in the precedent of *Grootboom* towards acceptable socio-economic rights jurisprudence. As Liebenberg correctly asserts, the ultimate test of constitutional recognition of socio-economic right is whether they result in real improvements in the quality of life of all.<sup>678</sup> A lack of court supervision into state measures, implemented in response to a successful constitutional challenge, calls into question whether any positive result is achieved from the "successful" court challenge in the first place.<sup>679</sup> In order to prevent this weakness of the *Grootboom* judgment being perpetuated, proposals in the final Chapter of this dissertation in relation to the right to food will have enforcement of any court order on the right to food as a priority.

Govindjee highlights the lack of timeframes for state compliance as a further weakness of the *Grootboom* judgment.<sup>680</sup> This fair criticism is closely related with the aforementioned lack of adequate court supervision into state compliance with court orders handed down. In light of

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<sup>674</sup> Wesson "Grootboom and Beyond: Reassessing the Socio-economic Jurisprudence of the South African Constitutional Court" 306.

<sup>675</sup> The court did indicate that a court can require the state to give an account of its progress in implementing those measures. *Grootboom* para 42. However, this point was not taken far enough, in that no indication was made of a report-back to the court of the implementation of the order.

<sup>676</sup> Bilchitz "Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-economic Rights Jurisprudence" (2003) Vol 19 Part 1 *SAJHR* 26.

<sup>677</sup> Pillay "Implementation of *Grootboom*: Implications for the Enforcement of Socio-economic Rights" (2002) Vol 6 No 2 *Law, Democracy and Development* 277 Pillay rightly contends that the *Grootboom* judgment has been restrictively interpreted with the consequence that there has been seemingly little positive policy change in favour of vulnerable groups in crisis situations.

<sup>678</sup> Liebenberg "The Right to Social Assistance: The Implications of *Grootboom* for Policy Reform in South Africa" 233.

<sup>679</sup> I will take this point further in the concluding Chapter.

<sup>680</sup> Govindjee *The Constitutional Right to Social Assistance as a Framework for Social Policy in South Africa: Lessons from India* 99.

the repeated extreme tardiness of the state to provide social grants plainly owing to qualified recipients, the need for clear and enforceable timeframes for the state to comply with court orders relating to socio-economic rights seems apparent.<sup>681</sup> In the context of a right to food challenge, where time is of the essence to avoid further malnourishment and conceivably starvation, there is a pressing need for clear timeframes for state compliance with court orders.

It has already been noted that *Grootboom* recognised the urgent needs of the vulnerable group in question. The court interpreted progressive realisation as improving accessibility over time to both a larger number and wider range of people.<sup>682</sup> This interpretation of the ambit of progressive realisation of the right to housing should apply *mutatis mutandis* to the right to food. In fact, the crux of *Grootboom* would appear to be that the Constitution requires the state to help those living in crisis situations or unbearable conditions.<sup>683</sup> In so finding, I would argue<sup>684</sup> that the court has narrowed the scope in which the state can escape liability for urgently meeting socio-economic rights in light of the “progressive realisation” caveats in sections 26(2) and 27(2).<sup>685</sup> Liebenberg argues that the immediate needs of these vulnerable groups are urgent. If meeting these urgent needs takes a back seat to government's long-term economic growth goals, the individuals and families concerned will be irreparably harmed. The results of abject poverty include malnutrition, health problems and premature death.<sup>686</sup> Hence crisis-situation food provision is called for.

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<sup>681</sup> For example, *Bacela v MEC for Welfare (Eastern Cape Provincial Government)*[1998] 1 All SA 525 (E) in which a grant applicant had been unlawfully denied pension arrears owing to her. The state (in)action amounted to a lack of administrative justice. For a broader discussion of this issue see Plasket “Administrative Justice and Social Assistance” 497 to 501.

<sup>682</sup> *Grootboom* para 45.

<sup>683</sup> Liebenberg “The Right to Social Assistance: The Implications of *Grootboom* for Policy Reform in South Africa” 257.

<sup>684</sup> Liebenberg argues along similar lines that, in light of *Grootboom*, socio-economic rights programmes are subject to constitutional challenge unless tangible progress is made to improve their implementation. Liebenberg “The Right to Social Assistance: The Implications of *Grootboom* for Policy Reform in South Africa” 246.

<sup>685</sup> The *Grootboom* judgment indicates that even if a progressive strategy is adopted, the expansion of access to programmes must be substantial enough to ensure that that “a significant number” of people living in severe poverty receive urgent assistance. *Grootboom* para 68. Whilst the court did not elaborate on what a significant number would be, this finding implies that the national feeding programme would have to be equally comprehensive to pass constitutional muster.

<sup>686</sup> Liebenberg “The Right to Social Assistance: The Implications of *Grootboom* for Policy Reform in South Africa” 254.

However, on the other side of the coin to *Grootboom*'s recognition of the urgent needs of vulnerable groups, is its rejection of the concept of minimum core rights.<sup>687</sup> The court made this finding despite the existence of the right to a minimum core of socio-economic rights in international law. The United Nations Committee on Economic, Social and Cultural Rights decided that the International Covenant on Economic, Social and Cultural Rights provides for such a minimum core of rights.<sup>688</sup>

The court's rejection of a minimum core of rights would appear to negatively affect a right to food claim in that, as things stand, claimants would not be entitled to demand immediate provision of food.<sup>689</sup> This argument is reflected in *Grootboom*'s rejection of the Respondents' claim to shelter or housing immediately upon demand.<sup>690</sup> However, Wesson argues that *Grootboom*'s rejection of the concept of the minimum core was justified. Wesson argues that the court was correct to reject the minimum core concept in that pro-minimum core arguments tend to overlook the complex relationship between core and non-core needs, and it is difficult to balance core and non-core needs against one another.<sup>691</sup> Notwithstanding the dangers of the concept highlighted by Wesson, I would argue that there remains a strong constitutional argument for judicial enforcement of a minimum core of rights. The *Grootboom* judgment itself notes that the goal of the Constitution is to effectively meet everyone's basic needs and that the progressive realisation requirement requires positive state steps to do this.<sup>692</sup> I would argue further that *Grootboom*'s recognition that reasonable measures must cater for those in "desperate need"<sup>693</sup> and those living in "intolerable conditions or crisis situations"<sup>694</sup> implies a theoretical acceptance of the right to certain minimum service provisions. Whilst the court rejected the concept of minimum core rights, the provision of basics for those in crisis situations seems to indicate the right of everyone to

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<sup>687</sup> *Grootboom* para 33.

<sup>688</sup> Para 10 of The United Nations Committee on Economic, Social and Cultural Rights: General Comment 3 issued in 1990. Cited in *Grootboom* para 29.

<sup>689</sup> *Grootboom* recognises the individual's right to demand state measures to begin to meet the relevant urgent housing needs, but this right does not equate to an individual having the right to immediate provision of housing. *Grootboom* para 94.

<sup>690</sup> *Grootboom* para 95.

<sup>691</sup> Wesson "Grootboom and Beyond: Reassessing the Socio-economic Jurisprudence of the South African Constitutional Court" 300. Wesson also notes that the Constitutional Court has often cast doubt upon its own competence to define the minimum core. *Ibid.*

<sup>692</sup> *Grootboom* para 45.

<sup>693</sup> *Grootboom* para 96.

<sup>694</sup> *Grootboom* para 99.

certain indispensable levels of rights.<sup>695</sup> It seems perverse that a right like the right of prisoners to vote was immediately enforced by the courts (in *August v Electoral Commission*)<sup>696</sup> yet our courts have yet to recognise any minimum core of socio-economic rights to which all are entitled. A vulnerable group, like the Respondents in *Grootboom*, would clearly want (and I would argue need) an actual order that the state is duty-bound to provide them with at least the most basic aspects of the right that is being denied to them. Instead the Respondents received nothing tangible: the promise of an improved state policy from which no immediate benefits are derived for the litigants could be said to discourage vulnerable groups from going to court in the first place.<sup>697</sup> People in crisis approaching the court for assistance surely seek an urgent improvement in their lives rather than court orders, which as far as the affected group are concerned, may or may not result at some undisclosed later date in an improvement in their situation. It is submitted that susceptible groups who are being wrongfully denied core socio-economic rights (like food and housing) should receive adequate food and proper shelter. Such ineffectual court orders are of little benefit for the “successful” litigants; because in reality they remain hungry and without shelter.

It is clear from the *Grootboom* judgment that broadening access to various types of socio-economic rights will have major resource implications for a resource-scarce country like South Africa.<sup>698</sup> The needs are great but the state’s resources can only go so far. Notwithstanding the resource challenges, the court indicated that national government must equitably allocate money to other levels of government to meet their socio-economic rights obligations.<sup>699</sup> On this basis, Liebenberg indicates that the state may not therefore ignore

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<sup>695</sup> *Grootboom* recognises that reasonable measures must take account of the degree and extent of the denial of the right they aim to realise. Furthermore, those with critically urgent needs, who are consequently most vulnerable, must not be ignored by the measures in place to provide the right. *Grootboom* para 45. Yet notwithstanding the court’s laudable recognition of the need to assist those critical need, the court failed to recognise that anyone has a minimum standard of rights which are individually enforceable.

<sup>696</sup> 1999 (3) BCLR 1 (CC).

<sup>697</sup> Wesson points out a related fear that, in terms of the reasonableness test laid down in *Grootboom*, even minimal state efforts will be considered sufficient to compliance with the court’s judgments. Wesson “*Grootboom and Beyond: Reassessing the Socio-economic Jurisprudence of the South African Constitutional Court*” 305.

<sup>698</sup> Liebenberg “The Right to Social Assistance: The Implications of *Grootboom* for Policy Reform in South Africa” 254.

<sup>699</sup> *Grootboom* para 40. The court also identified the state’s obligation to set money aside for the meeting of immediate requirements and the management of disasters. For the state to meet its constitutional housing obligations, its programme would have to be adjusted to include a focus on these urgent needs, even if doing so detracted from its long-term goals. However, beyond the requirement of reasonableness, the actual budgeting process was left in government’s hands. *Grootboom* paras 66 and 68.



immediate needs in favour of longer-term plans.<sup>700</sup> However, as has already been stated, the immediate claim is to a reasonable policy and implementation thereof, not to the provision of the right itself to the claimant. It will be remembered that the Constitutional Court in the *Soobramoney* case was very hesitant to make any findings as to budgetary allocations by state departments.<sup>701</sup> It would thus seem that the *Grootboom* judgment adopts middle ground between the hands-off approach of *Soobramoney* and an entirely interventionist judicial approach which could be said to blur the separation of powers doctrine. Wesson praises this approach in *Grootboom* as establishing a relationship of collaboration between the state and the courts, in terms of which these different branches of government apply their particular skills to the provision of rights.<sup>702</sup> In practice, this requires the government to explain the reasons for its actions and for the judiciary to assess the reasonableness thereof. The executive branch of government is best placed to allocate budgets, but the courts serve a “checks and balances” function to ensure that the government action is objectively reasonable.<sup>703</sup>

The final aspect of the *Grootboom* judgment which I will deal with briefly, as it was rejected by the Constitutional Court as a ground for granting relief, are the rights of children in terms of section 28 of the Constitution. I have already noted the Constitutional Court’s rejection of the Cape High Court’s reasoning that the Respondents, the majority of whom were children, and by virtue of the rights of the children, their parents, had to be housed by the state to comply with section 28(1)(c).<sup>704</sup> The Constitutional Court came to this decision on the basis that the children in question were in the care of their parents, not the state. The court explained that the court *a quo*’s decision created a number of illogical results. For example, adults with children would be entitled to housing by virtue of their having children, yet adults

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<sup>700</sup> Liebenberg “The Right to Social Assistance: The Implications of *Grootboom* for Policy Reform in South Africa” 254.

<sup>701</sup> *Soobramoney* 1997 (12) BCLR 1696 (CC).

<sup>702</sup> Wesson “*Grootboom* and Beyond: Reassessing the Socio-economic Jurisprudence of the South African Constitutional Court” 284 and 293.

<sup>703</sup> *Grootboom* clearly held that it would not prescribe the form which state policy should take. The court recognised the broad range of choices available to the state. The courts are then empowered to enquire into the reasonableness of the chosen government measures. *Grootboom* para 41.

<sup>704</sup> *Grootboom* para 77. The court therefore held that the rights of children to basic nutrition, shelter, basic health care and social services in s 28(1)(c) was to be read as the embodiment of their s 28(1)(b) rights to family or parental care, or alternative (state provided) care when the family environment is lacking. *Grootboom* para 76.

without children would not.<sup>705</sup> Sloth-Nielsen notes that the court being unable to discern a distinctive difference between the right of children to shelter in section 28 and the right to housing in section 26 was another reason for the court deciding that section 28(1)(c) did not create a direct and enforceable claim by children against the state.<sup>706</sup> The court indicated that, unlike the facts *in casu*, the state only owes specific duties to children in terms of section 28 if those children are in the care of the state, for example if the children live in a state institution.<sup>707</sup> However, if children are in the care of their parents or other guardians and not the state, the direct obligation to house them falls on the parents or guardians.<sup>708</sup> The court did, however, acknowledge the state's indirect obligations to children to put into place laws which require parents to fulfill their responsibilities to their children.<sup>709</sup> The indirect state obligation to provide mechanisms for the care of children by their parents or other guardians and direct obligation to provide care when parental care is lacking is in accordance with the United Nations Convention on the Rights of the Child<sup>710</sup> and forms part of South African common law and statute.<sup>711</sup> Sloth-Nielsen believes that *Grootboom's* caution that the rights of children in section 28 cannot trump other socio-economic rights (for example in section 26 and section 27) seems to indicate that the needs of children do not have to be accorded priority.<sup>712</sup> However, I contend that the needs of children can still be highlighted in line with *Grootboom's* acceptance of the need to prioritise government programmes which assist vulnerable groups with urgent needs. Children, who are dependent on others for support, will invariably constitute such a vulnerable group.

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<sup>705</sup> *Grootboom* para 71 Furthermore, providing unqualified socio-economic rights to children in all instances would make a nonsense of the caveats of progressive realisation and resource limitations applicable to other socio-economic rights. The court also warned that children could become stepping stones to housing for their parents instead of being valued in themselves. *Ibid.*

<sup>706</sup> Sloth-Nielsen "The Child's Right to Social Services, the Right to Social Security, And Primary Prevention of Child Abuse: Some Conclusions in the Aftermath of *Grootboom*" 218.

<sup>707</sup> *Grootboom* para 77.

<sup>708</sup> *Ibid.* It is therefore clear that the state's obligations to care for children is secondary to the obligations on the child's parents or guardians. The state's direct obligations, in this regard, only kick in when the parental care is lacking.

<sup>709</sup> *Grootboom* para 78.

<sup>710</sup> Cited in *Grootboom* at para 75.

<sup>711</sup> Sloth-Nielsen indicates that the parental duty of support is a trite aspect in common law and statute law in South Africa. (For example, parental obligations are found in the Child Care Act). The parental duty of support incorporates the provision of nutrition, shelter, and health care. Sloth-Nielsen, J "The Child's Right to Social Services, the Right to Social Security, And Primary Prevention of Child Abuse: Some Conclusions in the Aftermath of *Grootboom*" 225.

<sup>712</sup> Sloth-Nielsen "The Child's Right to Social Services, the Right to Social Security, And Primary Prevention of Child Abuse: Some Conclusions in the Aftermath of *Grootboom*" 229.

In relation to a right to food court challenge, it would seem that *Grootboom*'s rejection of section 28 as a basis for upholding the claim is likely to be applicable to a right to food challenge too. In other words, a right to food challenge is unlikely to succeed on the basis of the section 28(1)(c) right to basic nutrition of children in the care of their parents or other guardians. Conversely, the *Grootboom* case is *obiter* authority for the state to be constitutionally bound in terms of section 28(1)(c) to provide basic nutrition for all children in its alternative care.<sup>713</sup>

### **6.2.2.3 MINISTER OF HEALTH AND OTHERS v TREATMENT ACTION CAMPAIGN AND OTHERS (1)**

#### **6.2.2.3.1 THE FACTS AND COURT DECISION**

The main point of contention in *Minister of Health and Others v Treatment Action Campaign and Others (1)*<sup>714</sup> was whether the measures adopted by the state to provide access to health care services for HIV-positive mothers and their newborn babies fell short of the state's constitutional obligations. The government had in place a policy whereby an antiretroviral drug, Nevirapine, was made available only in selected research sites at certain government medical centres.<sup>715</sup> The Respondents, the Treatment Action Campaign (TAC), challenged the constitutionality of the government's programme as denying access to Nevirapine to people who did not have access to the research sites. The government opposed the application mainly on the grounds that it alleged an incapacity to make the treatment available nationwide at that point in time. The Constitutional Court was hearing an appeal from the decision of the Transvaal Provincial Division (TPD)<sup>716</sup> which found that the government had fallen short of its constitutional obligations. The TPD, per Botha J, found the government to have acted unreasonably in not reducing the risk of HIV-positive mothers passing on the virus to their babies at birth, in refusing to make Nevirapine available in the public health system when prescribed by the attending doctor and in failing to provide a timeframe for a

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<sup>713</sup> Sloth-Nielsen puts forward a rather tenuous argument that where child neglect arises purely because of poverty, the state could be ordered to adopt meaningful preventive measures. Sloth-Nielsen "The Child's Right to Social Services, the Right to Social Security, And Primary Prevention of Child Abuse: Some Conclusions in the Aftermath of *Grootboom*" 231 She makes this submission on the basis that the right of children to protection from abuse, neglect, maltreatment and degradation in s 28(1)(d) was held to be directly enforceable against the state. *Grootboom* para 78.

<sup>714</sup> 2002 (10) BCLR 1033 (CC).

<sup>715</sup> The Constitutional Court describes the government's HIV/ Aids treatment policy at paras 40 and 41 of *Treatment Action Campaign and Others v Minister of Health and Others* 2002 (10) BCLR 1033 (CC) (hereafter referred to as *TAC (1)*).

<sup>716</sup> *Treatment Action Campaign and Others v Minister of Health and Others* 2002 (4) BCLR 356 (T).

national programme to prevent mother-to-child transmission of HIV.<sup>717</sup> The government appealed against this order of the TPD. One of the main arguments raised by the government in court was an alleged incapacity to provide the treatment as prayed for by the TAC and Others.

The Respondents' (the Treatment Action Campaign and Others) original claim was based on an alleged denial of the constitutional rights of access to health care facilities in terms of section 27(1), subject to the internal limitations of section 27(2) and the rights of children in terms of section 28(1)(c) to basic health care services.<sup>718</sup>

The court heard argument that sections 26 (the right to housing) and section 27 (the right to health care, food, water and social security) of the Constitution should be understood as imposing positive obligations on the state to both give effect to the content of the rights indicated in subsection one of section 26 and section 27 and to do so progressively subject to the limitations and requirements of subsection two of both sections.<sup>719</sup> The Constitutional Court rejected the arguments put forward by *amici curiae* that everyone is entitled immediately to a minimum core of rights, finding instead that the state is duty-bound to progressively realise the rights in section 26 and 27 within its available resources provided that the measures adopted are reasonable.<sup>720</sup> In so doing the court took a narrow and literal interpretation of the applicable sections. However, despite this finding the court also recognised that notwithstanding the extremely challenging task of achieving the progressive realisation of socio-economic rights, the state is duty-bound by the Constitution to do so.<sup>721</sup>

The Constitutional Court re-examined the separation of powers doctrine by deciding that the judiciary is not best placed to make pronouncements upon matters where court orders could have compound social and economic results for the community. The court held that although court orders relating to reasonableness may have budgetary implications, the courts themselves should not rearrange budgets.<sup>722</sup> Reading into this part of the judgment, it is clear

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<sup>717</sup> TAC (I) para 2.

<sup>718</sup> TAC (I) para 4.

<sup>719</sup> TAC (I) para 29.

<sup>720</sup> TAC (I) para 39.

<sup>721</sup> TAC (I) para 94.

<sup>722</sup> TAC (I) para 38.

that the court regards the important task of budgeting as the prerogative of the executive branch of government.

As stated in the preceding paragraph, the Court recognised its constitutionally appointed role to assess the reasonableness of government programmes and their implementation in the context of this constitutional challenge. In doing this the Constitutional Court recognised the efficacy of Nevirapine as a suitable method of significantly reducing the risk of mother-to-child transmission of HIV.<sup>723</sup> The existence of the research and test sites for treatment was found to be a reasonable policy on the basis of the information-gathering potential which could be garnished from such sites.<sup>724</sup> However, the government's failure to create and implement policies to treat all those who could reasonably be treated, where such treatment was medically prescribed, was found to be unconstitutional.<sup>725</sup> The existing government policy was found to be unreasonable because it did not meet the needs of the mothers and their unborn children who had no access to the test sites.<sup>726</sup>

The Constitutional Court, in a unanimous decision,<sup>727</sup> set aside the TPD's order and replaced it with a more specific order. The Constitutional Court declared<sup>728</sup> that:

- sections 27(1) and (2) of the Constitution require the government to create and put into place within its available resources a comprehensive and co-ordinated programme to progressively realise the rights of pregnant women and their newborn babies to have access to health services to fight mother-to-child transmission of HIV.
- the aforementioned programme has to include sound measures for counselling and testing pregnant women for HIV, counselling HIV-positive pregnant women on what they could do to reduce the danger of mother-to-child transmission of HIV, and making suitable treatment available to them to reduce that possibility.

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<sup>723</sup> TAC (I) para 131.

<sup>724</sup> TAC (I) para 64.

<sup>725</sup> TAC (I) para 135.

<sup>726</sup> TAC (I) para 67.

<sup>727</sup> Hopkins argues that the Constitutional Court's order has essentially the same results for government as the TPD's decision it replaced- the Constitutional Court's order was simply stated in negative terms. Hopkins "Democracy in a Post-TAC Society" *De Rebus* (November 2002) 16.

<sup>728</sup> The order can be found at TAC (I) para 135.

- the existing government policy, and its implementation, for lessening the risk of mother-to-child HIV transmission failed to meet the requirements indicated in the last point in that:
  - (i) doctors at public health institutions away from the selected research sites could not prescribe Nevirapine to reduce the danger of mother-to-child transmission of HIV even where it was medically indicated and where satisfactory facilities existed for the testing and counselling of the pregnant women concerned; and
  - (ii) the policy failed to make provision for counsellors at public health institutions away from the selected research sites to be trained in counselling for the use of Nevirapine to reduce the risk of mother-to-child transmission of HIV.<sup>729</sup>

In summary, the Constitutional Court therefore ordered the government immediately to remove the restrictions preventing the use of Nevirapine from being made available in the appropriate circumstances at public health institutions away from the existing selected research sites. It similarly ordered the government to allow and facilitate the use of Nevirapine to reduce the risk of mother-to-child transmission of HIV and to make it available for this purpose at state medical facilities when called for by the attending medical practitioner acting in consultation with the medical superintendent of the facility concerned. The Constitutional Court referred to an increased budgetary allocation to facilitate this.<sup>730</sup> The court held that the use of Nevirapine would, if necessary, include appropriate testing and counselling of the mother concerned which would require trained counselors at all such facilities. The Constitutional Court's orders would not prevent the government from adapting its policy, providing such a change was constitutional, if equally suitable or better methods became available to it for the prevention of mother-to-child transmission of HIV.<sup>731</sup>

Significantly for this research, the Constitutional Court clearly indicated that its finding does not mean that everyone can immediately claim access to such treatment. Rather, every effort must be made to provide treatment as soon as reasonably possible.<sup>732</sup>

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<sup>729</sup> TAC (I) para 122.

<sup>730</sup> TAC (I) para 125.

<sup>731</sup> TAC (I) para 127.

<sup>732</sup> TAC (I) para 125.

### 6.2.2.3.2 SIGNIFICANCE OF *TAC (I)* TO THIS RESEARCH

The Constitutional Court examined the reasonableness of the government's HIV/ Aids treatment policy in the *TAC (I)* case, and ultimately found the policy unacceptable. This is significant in relation to a right to food claim in so far as it is not sufficient for the government to merely put into place a feeding scheme or schemes- in addition such schemes will have to be reasonable, as assessed by the courts, to pass constitutional scrutiny.

It is submitted that the Constitutional Court in *TAC (I)* reaffirmed a similar position to the *Grootboom* decision concerning the doctrine of separation of powers.<sup>733</sup> In both cases the Constitutional Court held that courts with constitutional jurisdiction are permitted to hand down decisions that impact on government policy. Welz observes that if such court action amounts to an incursion into the normal functions of the executive, it is mandated by the Constitution.<sup>734</sup> It was upon this basis that the court rejected an argument raised by the government that in terms the separation of powers doctrine any decision in favour of the Respondents would be limited to a declaration of rights.

Hopkins notes that in effect the decisions of Botha J in the TPD, largely restated by the Constitutional Court in *TAC (I)*, directing the government to make Nevirapine available in public health facilities to all HIV-positive mothers and their newborn babies, created government policy. The Constitutional Court held that it had a wide discretion to make any order that was just and equitable in terms of section 172(1)(a) of the Constitution. This discretion includes the power to grant mandatory relief and the power to exercise a degree of supervisory jurisdiction to ensure adequate compliance with its order. The Constitutional Court considered an order of supervisory jurisdiction unnecessary,<sup>735</sup> but did make a mandatory order.<sup>736</sup> When one considers the criticism raised against government's failure to

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<sup>733</sup> In support of this submission, the close correlation between *Grootboom* (para 29) and *TAC (I)* (para 98) on this point is noted.

<sup>734</sup> Welz "Judicial Restraint and the Enforcement of Socio-economic Rights in the Constitutional Court: A Comment on Minister of Health and Others v Treatment Action Campaign and Others" (December 2002) Vol 1 No 2 *Speculum Juris* 314

<sup>735</sup> Interestingly, the Court commented that the government had always respected and executed orders of the Court and there was no reason to believe that it would not do so in the present case. *TAC (I)* para 129.

<sup>736</sup> Bilchitz "Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-economic Rights Jurisprudence" 5.

properly comply with the earlier *Grootboom* decision, strong arguments could be put forward that supervisory jurisdiction was called for in the *TAC (I)* finding.<sup>737</sup>

Hopkins then goes on to raise the much discussed dangers of a blurring of the separation of powers doctrine through government policy being made by the judiciary in just such an instance.<sup>738</sup> However, Hopkins rightly points out that the Constitutional Court in *TAC (I)* has now indicated that the courts can create policy for government, albeit only in exceptional circumstances.<sup>739</sup> The exceptional circumstances he indicates would warrant such intervention include urgency and the existence of vulnerable people unable to help themselves.<sup>740</sup> This reconception of the traditional separation of powers doctrine, giving a more proactive role vis-à-vis policy making to the judiciary, will be considered in the concluding Chapter when more creative court orders are called for.

It has been noted already that the Constitutional Court in *TAC (I)* found the existing government policy to be unreasonable because it did not meet the needs of the mothers and their unborn children who had no access to the test sites.<sup>741</sup> Hopkins points out that this decision aligns with the Constitutional Court's earlier decision in *Grootboom* where it decided that any government programme excluding a significant segment of society is unreasonable.<sup>742</sup> In relation to a right to food challenge, reading into the *ratio decidendi* of both *TAC (I)* and *Grootboom* it is clear that government policy in relation to the right to food must ensure that all segments of society are catered for. However, in light of the statistics given in earlier Chapters that certain categories of people (including children, the elderly, people in rural areas generally and those otherwise falling outside the existing social

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<sup>737</sup> An argument to this effect is raised by Bilchitz. Bilchitz "Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-economic Rights Jurisprudence" 26.

<sup>738</sup> Hopkins "Democracy in a Post-TAC Society" *De Rebus* (November 2002) 16. Interestingly, later in the same article Hopkins actually highlights the advantages that this new interventionist judicial approach could have.

<sup>739</sup> Hopkins "Democracy in a Post-TAC Society" 17.

<sup>740</sup> Firstly, in relation to HIV/ Aids, the urgency of the required treatment well before the next election. Secondly, newborn babies have no meaningful access to the democratic process because they cannot yet vote. *Ibid.*

<sup>741</sup> The court found the existing policy to be unreasonable in that it did not provide for:  
"the administration of Nevirapine elsewhere in the public health system when there is capacity to administer it and its use is medically indicated".  
*TAC (I)* para 64.

<sup>742</sup> Hopkins "Democracy in a Post-TAC Society" 16. See also *Grootboom* paras 42 to 44 and 52.



assistance net) remain especially vulnerable to hunger and malnutrition, it is highly questionable whether current government food policy is catering for all segments of society.

Currie submits that the *TAC (I)* case illustrates the Constitutional Court's ability to challenge the government even when there is a risk of crisis.<sup>743</sup> However, as has already been contended above, the judgment can be criticised for its lack of supervisory jurisdiction over government's response to its order. In relation to a right to food challenge, the *TAC (I)* case provides encouraging precedent of the ability and willingness of our courts to question the reasonableness of government policy. However, it is submitted that our courts need to heed the lessons of *Grootboom* and *TAC(I)* in ensuring that future court orders enforcing socio-economic rights contain a supervisory element to ensure that government does not play mere lip-service to the findings of our constitutional adjudicators.

#### **6.2.2.4 *KHOSA AND OTHERS v MINISTER OF SOCIAL DEVELOPMENT AND OTHERS; MAHLAULE AND ANOTHER v MINISTER OF SOCIAL DEVELOPMENT AND OTHERS***<sup>744</sup>

##### **6.2.2.4.1 THE FACTS AND COURT DECISION**

This case had to determine the constitutionality of denying permanent residents in South Africa, who were not citizens of this country, the right to receive social assistance in terms of the Social Assistance Act.<sup>745</sup> The Constitutional Court upheld the High Courts' findings that the relevant parts of the Act<sup>746</sup> were unconstitutional and henceforth non-citizen permanent residents were also held to be entitled to receive social assistance. The court decided that the word "everyone" in section 27(1)(c)<sup>747</sup> of the Constitution did not allow the state to discriminate on the grounds of citizenship and exclude permanent residents from social assistance.

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<sup>743</sup> Currie "How Much to Adjudicate: The Constitutional Court's Jurisdictional Jurisprudence" (2004) *The Constitutional Court of South Africa: The First Ten Years* 56.

<sup>744</sup> 2004 (6) BCLR 569 (CC).

<sup>745</sup> *Khosa and Others v Minister of Social Development and Others; Mahlaule and Another v Minister of Social Development and Others* para 1.

<sup>746</sup> S 3 of the Social Assistance Act 59 of 1992 as read with the definition of a South African citizen in s 1 of the Act.

<sup>747</sup> S 27(1)(c) of the Constitution says:

"Everyone has the right to-...

Social security, including, if they are unable to support themselves and their dependents, appropriate social assistance" (own emphasis added).

Conversely, s 3 of the Social Assistance Act 59 of 1992 requires an applicant for social assistance to be a South African citizen.

The applicants in the *Khosa* case were two Mozambican citizens permanently resident in South Africa who, but for their citizenship, would have qualified for social assistance in South Africa.<sup>748</sup> The facts in the *Mahlaule* case dealt with child-support grants and care-dependency grants sought by different non-citizen applicants.<sup>749</sup> Owing to their similar nature (which was the reason for the Constitutional Court's conflation of the matters in the first place),<sup>750</sup> this analysis will not consider these two fact-complexes separately as its finding applied equally to both.

The applicants argued that their rights to social assistance in terms of section 27(1)(c) of the Constitution and their rights to equality, dignity and life in terms of sections 9, 10 and 11 respectively were all unfairly denied by the prevailing social assistance provision rules. They argued that the denial of these rights was not legitimized by the internal limitations of section 27 or the general limitations clause in section 36. A further argument was made on the basis of childrens' rights in terms of section 28.<sup>751</sup>

The various government functionaries who were respondents in the case alleged that non-citizens were not entitled to social assistance. As support for this submission they averred that after a period of five years of residence in South Africa, such permanent residents could apply to become South African citizens.<sup>752</sup> Clearly then, on obtaining citizenship, they would become entitled to social assistance benefits. The respondents raised various other arguments against the provision of social assistance to non-citizens, including the additional state expenditure which the inclusion of non-citizen permanent residents in state social assistance would incur<sup>753</sup> as well as the need to ensure that foreigners living in South Africa do not become a burden on the state here.<sup>754</sup>

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<sup>748</sup> *Khosa and Others v Minister of Social Development and Others; Mahlaule and Another v Minister of Social Development and Others* para 3 The court notes that all of the applicants were what it termed, "destitute". *Ibid.* The court later in its judgment referred to the "dire circumstances" of the applicants. Para 24.

<sup>749</sup> *Khosa and Others v Minister of Social Development and Others; Mahlaule and Another v Minister of Social Development and Others* para 4. These applicants were also Mozambican.

<sup>750</sup> *Khosa and Others v Minister of Social Development and Others; Mahlaule and Another v Minister of Social Development and Others* (hereinafter the case will be referred to as *Khosa*) para 12.

<sup>751</sup> *Khosa* para 38 to 39.

<sup>752</sup> *Khosa* para 55.

<sup>753</sup> *Khosa* para 60.

<sup>754</sup> *Khosa* para 63.

The respondents did concede that to deny child-support grants to South African children cared for by non-South African permanent residents was indeed unconstitutional.<sup>755</sup> In addition to the concession *vis-a-vis* child support grants, acknowledging the plight of the destitute applicants in need of care, one of the respondents informed the Court that a request had been made to the relevant government functionary to consider extending the definition of a “South African citizen” in the Act to accommodate applicants in this case. The respondents argued that these two concessions should settle the dispute between the parties and that there was therefore no need for a court order in this respect.<sup>756</sup> However, the court held that so long as legal uncertainty remained, a settlement between the parties would not preclude the Constitutional Court from making a definitive constitutionality finding.<sup>757</sup>

As was noted in the introductory paragraph of this particular case analysis, the court held that the right of “everyone” to social security and social assistance in section 27(1)(c) of the Constitution could not legitimately be said to exclude permanent residents who were non-citizens. The court held that equality in respect of access to socio-economic rights was implied by section 27 indicating that access to the rights therein applied to “everyone” and those unable to survive without social assistance are equally desperate and equally require such support.<sup>758</sup>

In coming to this majority decision the court examined the reasonableness of the aforementioned reasons given by the state for non-provision of social security and social assistance to non-citizens and found these to be unreasonable.<sup>759</sup> The finding of unreasonableness related primarily to the context in which the rights were denied to the applicants. In this regard the court weighed up the right to social security and the exclusion from the scheme of permanent residents, the purpose served by social security, the result of excluding permanent residents and the relevance of having a citizenship requirement to qualify for benefits. The court also considered the impact of the denial on other interrelated rights including the rights to life, dignity and equality.<sup>760</sup> The court decided that the provision

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<sup>755</sup> *Khosa* para 33.

<sup>756</sup> *Khosa* para 34.

<sup>757</sup> *Khosa* para 35.

<sup>758</sup> *Khosa* para 42.

<sup>759</sup> *Khosa* paras 49 to 57.

<sup>760</sup> *Khosa* paras 49 and 44 respectively.

of access to social assistance to permanent residents and the impact of such assistance to such persons' life and dignity far outweighed the resource and immigration arguments put forward by the state.<sup>761</sup> The court rejected the arguments put forward that the provision of social assistance to non-citizen permanent residents would be prohibitively expensive. In coming to this decision the court noted that even if the state's own budgetary figures were correct in this regard, the change sought would increase state spending on social assistance grants by under 2%.<sup>762</sup> In relation to the issue of budgetary allocation, the court held that even where the state was able to justify non-payment of benefits on the basis of unaffordability, the criteria used to limit benefits must not unreasonably limit other fundamental rights.<sup>763</sup>

#### 6.2.2.4.2 SIGNIFICANCE OF *KHOSA* TO THIS RESEARCH

As the decision in *Khosa* clearly built upon the jurisprudence of the preceding *Grootboom* and *TAC* judgments, many of the applicable principles for a right to food argument have already been discussed in relation to those cases and will therefore not be repeated here. However, there are certain aspects which still warrant discussion.

The *Khosa* case can be used as authority for the inter-relatedness of the core right in question (in this case social security) with other rights. The court noted that socio-economic rights in our Constitution are intimately linked to the key values and rights of human dignity, equality and freedom.<sup>764</sup> In *Khosa* the applicants rested their arguments on alleged violations of the rights to equality, dignity and life in addition to the main section 27(1)(c) argument.<sup>765</sup> For example, the court held that excluding permanent residents from social assistance entitlement is likely to severely impact on their dignity in that they would have to be assisted by others to meet their most basic needs, such dependence eroding their human dignity.<sup>766</sup> In relation to a right to food challenge, Chapter 3 of this dissertation has already examined the issue of upholding rights which are inter-dependent with the right to food. This multi-pronged

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<sup>761</sup> *Khosa* para 82.

<sup>762</sup> *Khosa* para 62.

<sup>763</sup> *Khosa* para 45.

<sup>764</sup> *Khosa* para 40. In finding thus the court confirmed the sentiments of Yacoob in *Grootboom* that rights are interrelated and are of equal importance. *Supra*.

<sup>765</sup> See *Khosa* para 38 and elsewhere in the judgment. In a minority judgment, Justice Ngcobo, also stressed the close nexus between socio-economic right provision and other core first generation rights like equality and dignity. *Khosa* para 104.

<sup>766</sup> *Khosa* para 80.

approach to realizing the right to food will be revisited in much more detail in the latter stages of this thesis in relation to both a direct court challenge and through interpreting other rights (especially socio-economic rights) in such a way as to better promote adequate food provision and access in South Africa.

The Constitutional Court in *Khosa* adopted a broad interpretation of social security and social assistance entitlement (through) its interpretation of the term “everyone” in section 27 of the Constitution.<sup>767</sup> It is submitted that such a broad interpretation is in accordance with the spirit and purport of the Constitution as espoused in the Preamble thereto. This generous interpretation of social security entitlement is shown in the *Khosa* judgment acknowledging that social security attempts to ensure basic living standards for all in which human life is valued as is the dignity, freedom and equality of all individuals.<sup>768</sup> Such a broad interpretation of social security entitlement under section 27 also, it is argued, supports the extensive ambit of the right to food I have proposed exists.

The decision in *Khosa* that an envisaged increase of under 2% of its social grant spending would result through the decision sought by the applicants indicates,<sup>769</sup> it is submitted, the court’s reluctance to order the state to make provision for socio-economic rights which it either cannot afford or would take away money which could be better spent in other ways. In applying this reasoning to the right to food, it is argued that whilst the problem of hunger and malnutrition is admittedly a more widespread problem, it has already been shown that hunger and malnutrition in South Africa is a problem of unequal distribution of resources, rather than a resource limitation issue. Therefore the realisation of the right to food should in fact be an easier problem to solve in this regard. The solution lies largely in interpreting existing programmes and laws in such a way as to better promote the right to food. In relation to those in critical need of food, such people should receive urgent state assistance, the limited nature of which (in terms of those who would qualify and the duration thereof) should mean that such crisis intervention is affordable.

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<sup>767</sup> In doing so the CC confirmed the decisions of the High Court requiring the state to provide social assistance under the Social Assistance Act to all residents qualifying for such assistance, irrespective of whether they are South African or not. *Khosa* para 9.

<sup>768</sup> *Khosa* para 52.

<sup>769</sup> *Khosa* para 62.

It is submitted that the court's approach in *Khosa* in assessing the (un)reasonableness of the state action in question through a weighing up of the advantages and disadvantages of the status quo versus the cost and overall result of provision of the right as sought<sup>770</sup> is useful in a right to food context. I will seek to justify this submission in two ways. Firstly, in a direct right to food court challenge it is hard to envisage any competing interests on the state or in the public interest which would trump measures to ensure that all South Africans have adequate food. Secondly, in interpreting analogous rights relating to issues like land redistribution, which have the ability to improve the food situation in South Africa, it is argued that interpretations of such rights and laws and policies relating to such rights must occur in such a manner as to promote the right to food. Such interpretations, it is submitted, would be "reasonable" as envisaged by the Constitutional Court in *Khosa*.

The *Khosa* case recognises that members of vulnerable groups in society are worthy of particular constitutional protection.<sup>771</sup> It is submitted that this finding is in line with the growing acceptance by the Constitutional Court of the need to adopt a broader interpretation of socio-economic rights entitlement for those in great need. As has been argued earlier in this dissertation, it is submitted that few rights are as worthy of urgent and thorough protection and promotion as the right to food for those suffering from hunger and malnutrition.

Mokoro J's finding that provided legal uncertainty remains, the Constitutional Court should still make a decision on the issue notwithstanding a settlement between the litigating parties,<sup>772</sup> may well be important in a right to food challenge. This submission is made on the basis that were a group of hungry or malnourished applicants to go to court arguing that their right to food was being denied to them, it would not suffice for the state to simply reach an out of court settlement with those specific applicants and ignore the potential unconstitutionality. Notwithstanding a settlement between the parties *in casu*, the *Khosa* case is therefore authority for indicating that a right to food challenge brought before a court with constitutional jurisdiction would have to be dealt with on the merits of the constitutionality of the state's conduct or omission or law(s) in question.

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<sup>770</sup> *Ibid.*

<sup>771</sup> *Khosa* para 74.

<sup>772</sup> *Khosa* para 35.

Govindjee and Ristow argue that the key question to be addressed by the court in *Khosa* was an equality-based one concerned with non-provision of benefits to a particular category of people.<sup>773</sup> The majority judgment in *Khosa* indicated that unlike the preceding socio-economic rights cases it had dealt with,<sup>774</sup> this case was the first in which the issue of unfair discrimination was a relevant consideration. Govindjee and Ristow indicate that the court had to decide whether or not the exclusion of non-citizens from the state's social security framework could be considered unfair discrimination.<sup>775</sup> It is submitted that in relation to the right to food, where particular categories of people are left hungry, malnourished or food insecure due to "falling through the net" of existing state food programmes or interrelated social security schemes, a similar argument can be made that such groups are being unfairly discriminated against.

Govindjee and Ristow highlight as another significant aspect of the *Khosa* decision, the court's willingness to consider and reject the state's resource-based argument as a reason for denial of a remedy.<sup>776</sup> Before the *Khosa* judgment, academic argument considered it unlikely that the Constitutional Court would accept a direct challenge to budgetary allocation.<sup>777</sup> The doctrine of separation of powers has been considered earlier in this research. However, Govindjee and Ristow note that the court in *Khosa* was happy to involve itself in an issue normally the domain of the legislature (and I would argue equally, if not more so, the executive). Furthermore, these writers indicate that in matters following this judgment it is clear that the state will not necessarily succeed in arguing a lack of resources as a reason for denial of a fundamental right.<sup>778</sup> It is worth reiterating the court's decision *in casu* that the provision of access to social assistance to permanent residents and the impact of such

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<sup>773</sup> Govindjee and Ristow "Permanent Residents and Eligibility for Social Security Grants: *Khosa and Others v Minister of Social Development and Others; Mahlaule and Another v Minister of Social Development and Others* 2004 6 SA 505 (CC); 2004 (6) BCLR 569 (CC)" (2005) *Speculum Juris* Vol 19 No 1 117.

<sup>774</sup> The judgments being referred to here were *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 1996 (4) SA 744 (CC); *Soobramoney supra*; *Grootboom supra*; and *TAC supra*.

<sup>775</sup> Govindjee and Ristow "Permanent Residents and Eligibility for Social Security Grants: *Khosa and Others v Minister of Social Development and Others; Mahlaule and Another v Minister of Social Development and Others* 2004 6 SA 505 (CC); 2004 (6) BCLR 569 (CC)" 117.

<sup>776</sup> *Ibid.*

<sup>777</sup> See Liebenberg "South Africa's Evolving Jurisprudence on Socio-economic Rights" (2002) Vol 6 No 2 *Law Democracy and Development* 179. See also Govindjee *The Constitutional Right to Social Assistance as a Framework for Social Policy in South Africa: Lessons from India* 102.

<sup>778</sup> Govindjee and Ristow "Permanent Residents and Eligibility for Social Security Grants: *Khosa and Others v Minister of Social Development and Others; Mahlaule and Another v Minister of Social Development and Others* 2004 6 SA 505 (CC); 2004 (6) BCLR 569 (CC)" 117.

assistance to such persons' life and dignity far outweighed the resource and other arguments of the state.<sup>779</sup> Whilst a right to food challenge would necessarily be affected by the particular fact-complex before the court, it is argued that it is equally unlikely that compelling enough reasons would exist to deny food rights to those in great need on the basis of state resource shortages. Furthermore, it may not be necessary to rely on the *Khosa* precedent in relation to a resource enquiry in light of the food problems in South Africa having been shown to be primarily ones of allocation rather than scarcity. However, when one considers that the state has raised resource limitations as defences to the claims in *Soobramoney*, *Grootboom*, *TAC* and *Khosa*, is likely that this will be the case too if a right to food challenge was to be authoritatively brought to our courts. It is encouraging that if a resource-limitation defence were to be put forward by the state, then the *Khosa* case provides authority for the court in question to apply its collective mind to the issue of budget allocations, not so as to usurp the rightful functions of the legislature and executive, but rather to ensure that these organs of state are performing their functions properly in that regard.

Finally, together with a similar approach in the *Grootboom* decision, it is submitted that *Khosa's* test for reasonableness<sup>780</sup> is a key aspect applicable to a right to food challenge. If an application is to be successfully brought to court against the current food provision laws and programmes, such an application will have to show the offending state action or laws to be unreasonable along similar lines.

### 6.3 THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION (SAHRC)

On accepting the justiciability of socio-economic rights in South Africa, the problem of ensuring government compliance with court orders remains.<sup>781</sup> It is submitted that the SAHRC has a crucial function to perform in terms of monitoring government role-out of socio-economic rights in terms of the state's constitutional obligations and more specifically in terms of court orders. The SAHRC's enforcement role is emphasised if one accepts that courts are not best positioned to enforce their own judgments and do not have the human resources and money to monitor implementation of their orders.<sup>782</sup>

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<sup>779</sup> *Khosa* para 82.

<sup>780</sup> *Khosa* paras 49 to 57.

<sup>781</sup> Ntlama "Unlocking the Future: Monitoring Court Orders in Respect of Socio-Economic Rights" 2.

<sup>782</sup> Ntlama "Unlocking the Future: Monitoring Court Orders in Respect of Socio-Economic Rights" 4.



Whilst this Chapter has already shown the courts to have been empowered to protect human rights,<sup>783</sup> section 184 of the Constitution empowers the SAHRC to do so too. The SAHRC is one of the state institutions set up in terms of section 181(1) of the Constitution to strengthen constitutional democracy in South Africa. A former MEC for Safety and Security in the Northern Province, Nthai, describes the SAHRC as the most important of these state institutions.<sup>784</sup> Ntlama submits that there is an emphasis placed on socio-economic rights in the Constitution through the protection provided by both the courts and the SAHRC.<sup>785</sup>

It is clear from their empowering provisions that the courts and the SAHRC have been given different roles to perform concerning socio-economic rights. Whilst the judiciary protects socio-economic rights through binding decisions, the SAHRC provides protection through what can broadly be termed a monitoring function.<sup>786</sup> The SAHRC must promote respect for, protect and develop human rights.<sup>787</sup> Perhaps even more significantly, the SAHRC is empowered to investigate and to report on whether human rights are being observed and to take steps to secure appropriate redress where human rights have been violated.<sup>788</sup> In addition to the constitutional provisions, the Human Rights Commission Act 54 of 1994 provides the SAHRC with information-gathering tools which should make its monitoring function easier to perform. When one considers the criticism highlighted earlier in this Chapter of a lack of necessary monitoring of government compliance with court orders and enforcement of court orders (especially in the *Grootboom* case), the SAHRC is ideally positioned to perform these roles in relation to the right to food and other socio-economic rights.

An example of the SAHRC's investigative role is its examination of suspected violations of many farm workers' basic human rights<sup>789</sup> in the Messina/ Tshipise district in the Northern Province. In the course of its investigations the Commission held public hearings in the district and inspected selected farms. The Commission made a series of recommendations on

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<sup>783</sup> The authority of the courts to hand down binding judgments is provided for in s 165(5) of the Constitution.

<sup>784</sup> Nthai "Implementation of Socio-economic Rights in South Africa." 41.

<sup>785</sup> Ntlama "Monitoring the Implementation of Socio-economic Rights in South Africa: Some Lessons From the International Community" 207.

<sup>786</sup> S 184 fleshes out the Commission's aims and powers.

<sup>787</sup> S 184(1)(a) and (b).

<sup>788</sup> S 184(2)(a) and (b).

<sup>789</sup> The alleged violations concerned harassment and unlawful arrests and detention.

the basis of its findings.<sup>790</sup> By holding public hearings as was done in this instance, the SAHRC should be able to accurately establish the actual extent of suspected rights violations. It is submitted that analogous investigations into alleged violations of the constitutional right to food could and should be undertaken by the Commission.

In relation to socio-economic rights, in terms of section 184(3) of the Constitution, the SAHRC must annually require relevant organs of state to provide information on specifically what they have done to realise the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment (which are all socio-economic rights).<sup>791</sup> Nthai argues that section 184(3) is clearly intended to tackle the abject poverty and the neglected settlements experienced by many South Africans.<sup>792</sup> Whilst the SAHRC's powers in terms of section 184 would appear to be non-legal in nature, Ntlama points out that the Commission has the power to take steps to secure redress where rights have been violated.<sup>793</sup> Ntlama argues that this redress can be sought by the SAHRC through litigation or recommendations to state organs.<sup>794</sup> This submission of Ntlama would appear to be supported by Brand and Heyns who highlight that the SAHRC has the potential to play a major role in socio-economic rights enforcement.<sup>795</sup> On the basis of this academic authority, it is submitted that the SAHRC has a crucial role to play in enforcing the right to food, one of the most fundamental of all socio-economic rights. In relation to the Commission's role in litigation pertaining to other socio-economic rights, the SAHRC has gone to court in the Eastern Cape in relation to wrongful denials of pensions by the state.<sup>796</sup>

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<sup>790</sup> Mochaba "South African Human Rights Commission investigation into alleged violations of farm workers' human rights in the Messina/Tshipise district" (1999) Vol 15 Part 4 *SAJHR* 614 to 615.

<sup>791</sup> S 184(3) says:

"Each year, the Human Rights Commission must require relevant organs of state to provide the Commission with information on the measures that they have taken towards the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment."

<sup>792</sup> Nthai "Implementation of Socio-economic Rights in South Africa" 41.

<sup>793</sup> This power is provided in s 184(2)(b).

<sup>794</sup> Ntlama "Monitoring the Implementation of Socio-economic Rights in South Africa: Some Lessons From the International Community" 208.

<sup>795</sup> Heyns and Brand "Introduction to Socio-economic Rights in the South African Constitution" in Bekker (ed) *A Compilation of Essential Documents on Economic, Social and Cultural Rights: Economic and Social Rights Series* 14.

<sup>796</sup> Nthai "Implementation of Socio-economic Rights in South Africa" 41. Also see further discussion relating to the SAHRC and the courts a little later in this Chapter.

Ntlama argues that another clear intention of all this monitoring by the SAHRC is for the Commission to produce reports on state progress in terms of socio-economic rights realisation.<sup>797</sup> It is submitted that this proposed aim of the SAHRC is being met in terms of its Economic and Social Rights Report Series.<sup>798</sup> In analysing the SAHRC's Economic and Social Rights Report Series, it is evident that the Commission requires the relevant organs of state to be fully accountable for their role in socio-economic right realisation and to justify their actions in this regard. Ntlama is of the opinion that state bodies having to justify their actions to the SAHRC (in terms of section 184(3) of the Constitution) ensures that state organs will keep socio-economic rights realisation on their list of priorities.<sup>799</sup> Delany argues that the reporting function of the SAHRC is also well placed to meet the reporting requirements of the International Covenant on Economic Social and Cultural Rights (ICESCR).<sup>800</sup> Ntlama believes that the Commission's reports have the potential to be a significant public record of monitoring of socio-economic rights violations but to be effective reports needs to be properly considered by parliament.<sup>801</sup> This is a very valid point as without remedial government action to implement the suggestions of the Commission it would appear to be merely an academic exercise, performing no tangible function. To have any real value it is argued that the state organs to which any SAHRC report is made must commit themselves to acting upon the recommendations made. Applying this argument to the right to food links with a key theme in this research: the need to turn the right to food into reality.

The SAHRC has been a litigant in certain cases and has been used by the courts to implement certain decisions. I will now briefly consider the role of the Commission in a few selected cases which went to court concerning alleged rights violations. These examples illustrate the useful function which the SAHRC can serve in the enforcement of rights. The focus on civil

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<sup>797</sup> Ntlama "Monitoring the Implementation of Socio-economic Rights in South Africa: Some Lessons From the International Community" 207. See a similar argument made by Newman "Institutional Monitoring of Social and Economic Rights: A South African Case Study and a New Research Agenda" (2003) Vol 19 Part 2 *SAJHR* 195.

<sup>798</sup> See for example, the South African Human Rights Commission Fifth Economic and Social Rights Report Series, 2002/2003 (2004).

<sup>799</sup> Ntlama "Monitoring the Implementation of Socio-economic Rights in South Africa: Some Lessons From the International Community" 209.

<sup>800</sup> Delany *Rights to Reality - The Right to Social Security, with Particular Emphasis on the Legal Resources Centre's Welfare Project in the Eastern Cape* 10. In terms of the ICESCR, state parties are required to report their progress at realising socio-economic rights in their country.

<sup>801</sup> Ntlama "Monitoring the Implementation of Socio-economic Rights in South Africa: Some Lessons From the International Community" 214.

and political rights is necessitated by a lack of much evidence of SAHRC intervention in relation to socio-economic rights.

In *S v Twala* the SAHRC intervened on behalf of a convicted person who requested leave to appeal by way of a handwritten letter not complying with the formal rules of court.<sup>802</sup> The court allowed the letter to be considered an acceptable application for leave to appeal and hence condoned the failure to comply with the ordinary rules pertaining to leave to appeal applications. This case, it is submitted, points towards an even greater role which the SAHRC could play in educating people both as to the content of their rights and then how to protect those rights via the judicial process.

The *Grootboom* case, discussed earlier, demonstrates the SAHRC's monitoring role.<sup>803</sup> In this case the Constitutional Court tasked the SAHRC with monitoring the implementation of the court-ordered state housing programme which the state was required to formulate and put into action for homeless people.<sup>804</sup> However, as was noted in my above critique of the *Grootboom* decision, notwithstanding the SAHRC having been mandated to perform this monitoring role, state compliance was extremely tardy.<sup>805</sup> It is therefore submitted that specific parameters for government compliance with court orders, such as timeframes, are called for in order for the Commission to be capable of properly monitoring compliance with a particular court order. It is submitted that applicants would be well advised to include in their applications specific prayers relating to monitoring of orders sought and time-frames for compliance.

An example of a case wherein the SAHRC acted as a litigant is the seminal *Bhe* judgment in which male primogeniture in customary law of intestate succession was held to be unconstitutional.<sup>806</sup> The SAHRC (and the Women's Legal Centre Trust) acted in both their own interests and in the interests of the public.<sup>807</sup> In the context of a right to food challenge,

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<sup>802</sup> *S v Twala (South African Human Rights Commission Intervening)* 2000 (1) SA 879 (CC).

<sup>803</sup> 2000 (11) BCLR 1169 (CC).

<sup>804</sup> *Grootboom* para 97.

<sup>805</sup> See the arguments to this effect made earlier in this Chapter. In particular see footnotes 103 to 107 of this Chapter and the main text to which they relate.

<sup>806</sup> *Bhe and Others v Magistrate, Khayelitsha and Others; Shibi v Sithole and Others; SA Human Rights Commission and Another v President of the RSA and Another* 2005 (1) BCLR 1 (CC).

<sup>807</sup> *Supra* para 30.

it is argued that as in the *Bhe* case the Commission would be able to act as both a litigant in its own right and in the interests of the public.

In the realm of unfair discrimination on the basis of disability, the SAHRC assisted Ms Esthe Muller in successfully obtaining a court order against the Department of Public Works and the Justice Department in the Equality Court in Germiston.<sup>808</sup> The case related to inadequate wheelchair access to court buildings. In terms of one part of the court order, the two government departments were given a set time-period to provide the SAHRC with a report on measures taken to remedy the situation.<sup>809</sup> There is no conceivable reason why a successful right to food challenge brought to court could not require the government department(s) concerned to provide the SAHRC with a report, within a stipulated period, setting out the remedial action taken in response to the court order.

The SAHRC worked together with academics in formulating questionnaires to gauge grass-roots perception of measures taken by state organs to realise social and economic rights.<sup>810</sup> If properly used, these questionnaires have the potential to aid government's decision-making through the provision of accurate information on the affect of government's food policies on the people such policies are intended to assist. However, the questionnaires used to date have been criticized for being too complex.<sup>811</sup> Furthermore, it has been said that government departments do not provide enough information to the Commission, in part due to financial and human resource limitations.<sup>812</sup> It is submitted that whilst problems with such questionnaires need to be ironed out, they have the potential to significantly aid the Commission in its work. For example, when one considers that hunger and malnutrition is often encountered in remote parts of South Africa, it is imperative to come up with mechanisms to gauge adequate food availability.

Whilst the SAHRC's actual and potential role as an enforcer of human rights has many positive aspects, it is also open to criticism on a number of grounds. The Commission has

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<sup>808</sup> Unreported decision handed down on 24 February 2004. Cited in *De Rebus* "Between Issues" (March 2004). Accessed at [www.derebus.org.za](http://www.derebus.org.za) on 29 April 2006.

<sup>809</sup> *Ibid.*

<sup>810</sup> Engh "Developing Capacity to Realise Socio-Economic Rights. The Example of HIV/Aids and the Right to Food in South Africa" 5.

<sup>811</sup> Engh "Developing Capacity to Realise Socio-Economic Rights. The Example of HIV/Aids and the Right to Food in South Africa" 4.

<sup>812</sup> *Ibid.*

been criticised for having focused insufficient attention on the implementation of socio-economic rights.<sup>813</sup> Govindjee notes that the Commission has also been criticised due to a lack of guidelines regarding what exactly should be monitored and timeframes for feedback. Again this failure has related mainly to socio-economic rights.<sup>814</sup> On a slightly different line, I submit that whilst the SAHRC does perform a useful function, the reliability of its reports is negatively affected by the fact that the Commission's reports are based on the reports of the applicable state organs themselves. What I mean by this is that a state department which has failed to deliver adequate performance might well not readily admit its shortcomings. This is analogous to being the referee in a sporting match in which one is also a participant. Furthermore, from a perspective of openness and accountability, it would appear nonsensical for state functionaries to form a pivotal part of their own assessment.<sup>815</sup> Finally, on a very practical level, the SAHRC is hamstrung by not having any budgetary allocation for monitoring court orders.<sup>816</sup> Quite clearly this needs to be remedied if the Commission is to be able to adequately perform this important task.

It would thus seem that the SAHRC has the potential to strengthen constitutional democracy in South Africa as section 181(1) of the Constitution requires it to do. The Commission has already made a positive impact in various respects, but there is definitely room for improvement in others. It is submitted that the SAHRC can play a central role in the enforcement of the right to food.

## 6.4 CHAPTER CONCLUSION

This Chapter has focused on the interpretation of socio-economic rights entitlement by the Constitutional Court in leading judgments. Possible applications of these judicial pronouncements to the right to food have been proposed. Finally, the crucial role of the

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<sup>813</sup> Nthai (July 1999) *De Rebus* 41.

<sup>814</sup> Govindjee *The Constitutional Right to Social Assistance as a Framework for Social Policy in South Africa: Lessons from India* 96. See also Ntlama "Unlocking the Future: Monitoring Court Orders in Respect of Socio-Economic Rights" 4. Here Ntlama identifies problems of our courts requiring SAHRC monitoring of its orders, without sufficient guidelines as to the scope of the monitoring to be done and a lack of timeframes for the job to be done.

<sup>815</sup> I will take this criticism further in the final Chapter of this thesis when I will put forward proposals for improving the *status quo*.

<sup>816</sup> Ntlama "Unlocking the Future: Monitoring Court Orders in Respect of Socio-Economic Rights" 4. This information was obtained by Ntlama in a personal communication with Mr A. Mahomed, the Western Cape SAHRC Provincial Co-ordinator.

SAHRC in enforcing socio-economic rights compliance has been considered. This leads onto the final Chapter of this dissertation where suggestions as to how to better realise the right to food in South Africa will be brought together.

## CHAPTER 7

### PROPOSALS AND CONCLUSION

#### 7.1 CHAPTER INTRODUCTION

The aforementioned Chapters have shown various anomalies relating to the right to food. On the positive side there is a clear constitutional right to food, which like other socio-economic rights is undeniably justiciable. The constitutional right to food is informed by rich international law jurisprudence and a Constitutional Court which has shown a willingness to give socio-economic rights substance.<sup>817</sup> Furthermore there exist various policies from government which have the potential to enable the realization of the right to food. However, juxtaposed with such positives are a series of negatives. The actual roll-out of government policies and programmes relating to food provision and food security as well as failures in other spheres of service delivery, such as poor provision of social assistance grants and the slow pace of land reform, mean that many South Africans remain hungry or malnourished.<sup>818</sup> We are therefore facing a paradox when it comes to the right to food in South Africa:

“the disparity between the most admirable constitution in the history of the world and an increasingly harsh reality for common South Africans is probably as wide as it can get.”<sup>819</sup>

The previous Chapters have posed serious questions as to whether the state can be said to meeting its section 27 and section 28 rights to food obligations. At the very least, the earlier analysis of South Africa’s existing food provision measures and roll-out has shown that the status quo is flawed in that there remain many hungry and malnourished people in this country. The question then remains how to best remedy the shortcomings and in so doing better and adequately realise the right to food. What this final Chapter aims to do is to point out some suggestions as to how the right to food can be better realised. The foundations for most of the proposals have been laid in earlier parts of this research. Rather than reiterating the earlier suggestions as they were discussed in earlier Chapters, what I will do in this

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<sup>817</sup> I have in mind here the aforementioned *Grootboom* and *TAC* judgments particularly.

<sup>818</sup> See the statistics in Chapter 1 indicating the extent of hunger, food insecurity and malnutrition still present in South Africa.

<sup>819</sup> Coomans & Yapko “A Framework on the Right to Food- An International and South African Perspective” 33.



Chapter is to summarise the most salient aspects thereof and consider them in light of the discussion as a whole. This concluding Chapter will consider a two-fold approach in which the right to food could be better realised. Firstly, a direct court challenge will be considered whereby it will be argued that with the correct applicants it could be successfully argued that the constitutional right to food is being currently denied in certain circumstances. However, certain features of such a possible challenge which differ from successful socio-economic rights cases launched to date will be raised and therefore indicate that in all likelihood the second proposition is a more viable option. The second proposed option, which is a more holistic approach, will consider promoting the right to food through interpretations and applications of related existing laws and policies in such a way as to better promote the right to food.

## **7.2 PROPOSAL 1: COURT CHALLENGE**

### **7.2.1 GENERAL COMMENTS**

In order to launch a successful socio-economic rights challenge in court, it is necessary for an affected group of people to prove the unfair denial of a right. Many of the aforementioned arguments have indicated that there does indeed appear to be a breach of particular persons' and groups' right to sufficient food in section 27(1)(b) and the rights of children to basic nutrition in section 28(1)(c). The question that I seek to deal with at this juncture is to consider the prospects of such a challenge succeeding. To do this I will consider both arguments in favour of a direct court challenge and those against it.

### **7.2.2 ARGUMENTS IN FAVOUR OF A COURT CHALLENGE AGAINST THE CONSTITUTIONALITY OF GOVERNMENT POLICY AND ACTION**

The most obvious barometers against which the likelihood of such a constitutional challenge being successfully launched can be tested are the key socio-economic rights judgments discussed in Chapter 6 of this dissertation. The extension of the ambit of socio-economic right enforcement by the Constitutional Court in the *Grootboom*,<sup>820</sup> *TAC*<sup>821</sup> and *Khosa*<sup>822</sup> cases has been discussed in the previous Chapter and will not be repeated in detail again here. In summary it can be said that these cases indicate that existing law or policy which

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<sup>820</sup> 2000 (11) BCLR 1169 (CC).

<sup>821</sup> 2002 (4) BCLR 356 (T).

<sup>822</sup> 2004 (6) BCLR 569 (CC).

unreasonably denies a socio-economic right will not pass the constitutional muster. In this regard the lack of existing programmes to cater for certain categories of desperate people is perhaps most susceptible to constitutional challenge. Brand's research has shown that government's food policy fails to cater for people in crisis situations.<sup>823</sup> The food-crisis position faced by certain individuals and groups is shown by the statistics cited in Chapters 1 and 5 of this dissertation. In assessing government socio-economic rights policy, Bilchitz sensibly argues that it is necessary for such policy to prioritise the urgent requirements of those in dire need whose very survival is threatened by the status quo.<sup>824</sup> It would therefore be useful to reconsider instances of so-called "urgent cases" where right to food challenges could be launched. This is done immediately below.

The argument in favour of a court challenge can be illustrated by two examples. Firstly, hungry or malnourished high school pupils who receive no food at school and as a result cannot concentrate on their studies could argue that they are as in need of food at school as their primary school counterparts: hence the lack of a high school feeding programme arguably unreasonably breaches both their section 27 and section 28 food rights. Secondly, hungry or malnourished adults who do not qualify for some form of social assistance grant or a social relief of distress grant could argue that their right of access to food in section 27 is being denied to them if they are unable to adequately feed themselves. For example, in the *Kutumela v Member of the Executive Committee for Social Services, Culture, Arts and Sport in the North West Province*<sup>825</sup> case, discussed in Chapter 5, the dire food situation of Mr Abbey Kutumela, the first applicant in that matter, was described in his founding affidavit. Mr Kutumela described the situation of the applicants, including himself, as:

"presently without food, or ... living without food and (are) in desperate need of social assistance."<sup>826</sup>

And

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<sup>823</sup> See generally, Brand "The Right to Food" in Brand and Heyns (eds) *Socio-Economic Rights in South Africa* 153.

<sup>824</sup> Bilchitz "Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-economic Rights Jurisprudence" 1.

<sup>825</sup> Case 671/2003.

<sup>826</sup> *Kutumela* case 671/2003 paras 9.1 and 9.2 of Founding Affidavit.

“We struggled to survive, and often went hungry. Our only income at the time was what my wife could earn doing part-time domestic and cleaning work in the area. She earned about R 60 per week. It was not enough to feed us. We had to beg and borrow food.”<sup>827</sup>

It is absolutely apparent that people in a similar position to Mr Kutumela require urgent food assistance in order for their right to food to be met as well as to promote the interrelated rights such as dignity and equality which such suffering causes. In the *Kutumela* case the situation could be remedied by way of the provincial government being forced to roll out the Social Relief of Distress Grant. However, as was noted in Chapter 5, this grant has limited application as well as duration (albeit that a limited extension is possible). Therefore it is argued that persons in a food-crisis position like Mr Kutumela, who either do not qualify for a Social Relief of Distress Grant or continue to lack food after having had a grant, could justifiably argue that the state’s response in failing to take adequate measures to meet their needs is unconstitutional. Furthermore, those whose right to food appears to be being denied to them need to be aware of their right to food and what it entails. This last point would indicate the need for an education drive on the right to food for all food insecure individuals, for without knowledge of the existence of a right it cannot be properly exercised. Education on the right to food will significantly increase the prospects of a suitable litigant or group of litigants coming forward to successfully challenge the constitutionality of the existing state response to the issue.

It could be argued that the aforementioned arguments in favour of the provision of some form of direct food-provision assistance would go against the precedent of *Grootboom* which rejected an entitlement to a minimum core of rights in the particular circumstances of that case.<sup>828</sup> However, in that judgment the court did recognise that there may be particular fact complexes in which it could be both possible, and more significantly appropriate, to consider the content of a minimum core obligation to establish the reasonableness of state action.<sup>829</sup> Furthermore, as was argued in Chapter 6 of this dissertation, the later *Khosa* decision provides authority for weighing up competing considerations to provide for the most basic of needs.<sup>830</sup> In doing this, the Constitutional Court in *Khosa* also showed its readiness to make wide-ranging orders on issues of social justice for those in greatest need in society. The *TAC*

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<sup>827</sup> *Kutumela* case 671/2003 para 21 of Founding Affidavit.

<sup>828</sup> *Grootboom supra*.

<sup>829</sup> *Grootboom* para 33.

<sup>830</sup> *Khosa* para 82.

case too, in which the wider state roll-out of anti-retrovirals was found to be necessary, supports the requirement for state policy to meet peoples' most basic, urgent needs.<sup>831</sup> It is therefore argued that there is ample judicial authority for a direct court challenge against state policy which fails to meet the most basic, urgent and life-sustaining needs of certain people in South Africa.

From a procedural perspective, a final aspect in favour of a direct court challenge is the very broad access to court provided for in section 34 of the Constitution as read with the wide *locus standi* provisions of section 38.<sup>832</sup> Applying section 34 to the right to food, it is clear that litigants have the right to approach the appropriate court to enforce an alleged infringement of the right. As was noted in Chapter 2, a very broad range of interested and affected parties have *locus standi* in terms of section 38 of the Constitution. In relation to the right to food it is envisaged that *locus standi* could potentially be founded on any one or more of the grounds provided for in subsections a) to e) of section 38. To elaborate, a hungry or malnourished person not benefitting from a state feeding programme could challenge the state action or inaction in his own interests. Alternatively, such an affected person might be a young child or elderly or infirm person unable to act on his own, in which case someone could act for him.<sup>833</sup> A class action could be also formed by those in a similar position or public interest litigation launched. In the latter categories an organization like the Legal Resources Centre is well placed to assist such affected persons. A precedent for *locus standi* vis-à-vis a socio-economic right being successfully based upon public interest standing is *Nomala v Permanent Secretary, Department of Welfare, and another*.<sup>834</sup> Finally, assuming that those allegedly being denied the right to food are members of an association, such an association can act in the interest of its members. An example of this last category would be a particular civic organization representing its members who fall outside the realm of government feeding programmes. It is therefore submitted that these broad *locus standi* options provide a useful tool to enforce the right to food by means of a direct court challenge.

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<sup>831</sup> TAC *supra*.

<sup>832</sup> These were discussed in Chapter 2 of this dissertation.

<sup>833</sup> The *Soobramoney* case (*supra*) is precedent for *locus standi* being grounded on such a basis.

<sup>834</sup> 2001 (8) BCLR 844 (E). This case related to the unlawful canceling of social grants. Pillay held that the applicant had *locus standi*, based on acting in the public interest, to challenge the purported reasons given in a pro forma letter for the cancellation or rejection of grant applications.

### 7.2.3 ARGUMENTS AGAINST SUCH A COURT CHALLENGE AND RATHER TOWARDS IMPLEMENTATION TEST-CASES

It is submitted that a right to food challenge at this stage would have key differences from the successful challenges against the denial of housing in *Grootboom*, medical care (in the form of HIV-Aids drugs) in *TAC* and social assistance grants in *Khosa*. In the aforementioned cases the state did not have in place a policy or satisfactory policy for catering for the category of harmed persons in question. However, in relation to food, whilst it is still a moot point whether the state's food policy can be considered reasonable, there are in place the Integrated Food Security Strategy and the Draft Procedure Manual for Social Relief of Distress.<sup>835</sup> For example, the Social Relief of Distress Grant, as was discussed in Chapter 5, provides a degree of direct crisis food provision in the form of food stamps for a limited period. The potential of the Social Relief of Distress Grant as a means to counter emergency food problems has been greatly improved by the Draft Procedure Manual for Social Relief of Distress formulated in response to the *Kutumela*<sup>836</sup> case. Therefore considering the adoption of these seemingly adequate initial state responses to the issue, there appears no need to go to court to order the creation of a feasible system at this stage. It may be prudent to gauge their implementation at greater length before attacking constitutionally the merits of the state's response to the right to food challenges.

Therefore whilst not going so far as to say that a direct right to food court challenge would be unsuccessful, the fact that the state has put into place measures to meet some of the most glaring needs provides sufficient reason not to rush into a constitutional challenge at this stage. If the implementation of these policies and programmes is unsatisfactory, the court option remains open.<sup>837</sup> However, just as was the case in the Eastern Cape with the numerous challenges brought against the failure to pay out old age pensions,<sup>838</sup> so there may exist a

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<sup>835</sup> Draft Procedure Manual for Social Relief of Distress. February 2006. [www.gov.za](http://www.gov.za) (accessed on 1 November 2006).

<sup>836</sup> Case 671/2003.

<sup>837</sup> The quote of Liebenberg cited in Chapter 5 is worth reiterating in this regard:

“unless measurable progress is made to improve the implementation of social assistance programmes, national and provincial departments of social development will be vulnerable to constitutional challenge”.

Liebenberg “The Right to Social Assistance: The Implications of *Grootboom* for Policy Reform in South Africa” 246.

<sup>838</sup> See the cases discussed in Chapter 4 in this regard. For example, *Kate v MEC for Department of Welfare, Eastern Cape*, 2006 (4) SA 478 (SCA), *Mbanaga v MEC for Welfare, Eastern Cape and another* 2002

very useful role for court challenges whenever the state fails to provide or unduly delays provision of Social Relief of Distress Grants when their issuing is justified in cases of undue hardship in terms of the Draft Procedure Manual for Social Relief of Distress. Such cases will ensure that Social Relief of Distress Grants are being properly used and in so doing will ensure access to food (albeit for a limited duration) to the recipients. For example, it was noted in Chapter 5 that application can be made for extension of a Social Relief of Distress Grant for a second three-month period.<sup>839</sup> Applicants in conditions of unemployment, dire poverty and hunger could apply to court to argue that a denial of the extension of a grant for a second period is unreasonable. This argument on a court challenge against an inadequate application of a Social Relief of Distress Grant is equally applicable to a court challenge against any unacceptable roll-out of other food provision programmes created by government.

It will require extensive on-site research to establish whether government food programmes are being properly administered before successful court challenges on this basis may be launched. Such test cases and research would warrant co-operation between legal aid organisations like the Legal Resources Centre, Legal Aid Board, University Legal Aid Clinics and other non-governmental organizations (NGO's) like the Black Sash and FAMSA. Such court challenges would challenge state inaction and inefficiency, whenever it exists, in order to ensure compliance from that time forward. In each application costs should be sought against the state to serve as an incentive to properly roll out the programmes thereafter.

As the Draft Procedure Manual for Social Relief of Distress is fairly new policy, it is important that knowledge of the rights contained therein are widely disseminated to affected persons by way of NGO's and others in regular contact with likely qualifying recipients of Social Relief of Distress Grants. Without knowledge of the new policy, affected persons will not be aware that they could qualify to receive a grant and to take the matter to court if their

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(1) SA 359. (SE), *Kotze v Minister of Health and another* 1996 (3) BCLR 417 (T) and *Bushula and others v Permanent Secretary, Department of Welfare, Eastern Cape and another* 2000 (2) SA 849 (E).

<sup>839</sup> Liebenberg and Tilley *Poverty and Inequality Hearings: Social Security Theme* (background paper for South African National Non-Governmental Organisation (SANGOCO), the South African Human Rights Commission and the Commission for Gender Equality 11.

application is improperly dealt with by the state.<sup>840</sup> Furthermore, such organizations are well placed to assist worthy applicants in applying for grants and in so doing assist them in realizing their right to food amongst other rights.

This fairly cautious suggestion of mounting challenges against specific instances of failing to implement the existing policy properly rather than attacking the constitutionality of the state's response to the food issue itself is supported by the fact that none of the existing academic writing on the right to food in South Africa has suggested a direct court challenge.<sup>841</sup> However, in opposition to this argument is the fact that simply because a court challenge has yet to occur, be conceived or written about does not mean that it could and should not be the case. A case in point is the pending court challenge against the age differential for old age grants for men and women.<sup>842</sup> It could have been assumed before papers were filed in this matter that the status quo (in terms of just discrimination) was clearly satisfactory (i.e. constitutional) and hence not worthy of a constitutional challenge. Only now that the challenge is soon to be heard has the issue been subject to some academic scrutiny.<sup>843</sup> However, assuming that the time is not best at present to mount a court challenge on the merits of existing food policy, some alternative needs to be formulated in light of the gaps in the right to food which this research has highlighted in previous Chapters. This is where the multi-faceted approach below may be an answer.

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<sup>840</sup> The research of both Govindjee and Brand indicate that the Social Relief of Distress Grant is underutilized. Govindjee *The Constitutional Right to Social Assistance as a Framework for Social Policy in South Africa: Lessons from India* 131; and Brand "Between Availability and Entitlement: The Constitution, *Grootboom*" in *Law, Democracy and Development* 18. It is submitted that improved community education on the Grant would go some way to increasing the number of applicants and correspondingly grant holders.

<sup>841</sup> This includes the extensive writings of Mr Danie Brand on the subject. His writings on the constitutional right to food are perhaps found in their most complete form in Brand "The Right to Food" in Brand and Heyns (eds) *Socio-Economic Rights in South Africa* 153. In this comprehensive analysis of the right to food Brand makes no suggestion of a court challenge as a way to better realize the right to food.

<sup>842</sup> Krüger " 'Come back when you are 65, Sir.' : Discrimination in respect of access to social assistance for the elderly" Forthcoming in *LDD* 2006(2). See also Matyu "Men challenge ruling which allows women earlier pension" *The Herald* (11 November 2005) available at [http://www.theherald.co.za/herald/2005/09/16/news/n04\\_16092005.htm](http://www.theherald.co.za/herald/2005/09/16/news/n04_16092005.htm).

<sup>843</sup> See Krüger " 'Come back when you are 65, Sir.' : Discrimination in respect of access to social assistance for the elderly" Forthcoming in *LDD* 2006(2).

### **7.3 PROPOSAL 2: A MULTI-FACETED APPROACH OF PROMOTING THE RIGHT TO FOOD THROUGH PROMOTING RIGHTS WHICH SUPPORT THE RIGHT TO FOOD**

This dissertation has on a number of occasions argued that the right to food is intrinsically linked with numerous other rights. Consequently, when it comes to considering ways to provide greater access to adequate food for all as required by section 27 of the Constitution and adequate nutrition for children in terms of section 28, improving access to these other rights in such ways that improve access to food is an obvious solution. This part of the dissertation will therefore consider how such interpretations of related rights and laws and policies relating to such rights can occur so as to do just this. Brand provides academic authority for such an approach in noting that the right to food is often not directly protected by law or court rulings. As a result he indicates that the right to food more commonly finds protection through other constitutional rights.<sup>844</sup> Some of this analysis will necessarily involve a degree of repetition from earlier Chapters where the beginnings of such suggestions have already been pointed towards. However, this analysis will be limited to certain legislation and state programmes relating to other rights which may be used to protect the right to food, rather than repeating Chapter 3's discussion on how the right to food can and does overlap in general terms with the rights to life, equality, dignity, property, social security (including social assistance), water, health care and education. The role of education, due to the multi-faceted role which it may have in enriching the right to food, will be considered closely.

In addition to an analysis of possible new interpretations of interrelated rights, this section will also make proposals as to more progressive court orders on the right to food and the better enforcement of such court orders by the SAHRC and by other means. The possibility of introducing certain new measures applicable specifically to the right to food, such as framework food legislation and the Basic Income Grant, will also be considered. Due to the inescapable link between the right to food and the roll-out of government food programmes, proposals concerning administrative justice and the right to food will be made. This whole section will focus on measures which have a practical impact on the provision of access to food. This focus accords with the insightful comment of Ntlama that:

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<sup>844</sup> Brand "The Right to Food" in Brand and Heyns (eds) *Socio-Economic Rights in South Africa* 164 to 165.



“While the world admires South Africa for its modern and progressive Constitution, it is time that South Africans begin to focus on the implementation of the rights in question, and related court orders.”<sup>845</sup>

### **7.3.1 INTERPRETING RELATED RIGHTS AND POLICIES IN A MANNER WHICH PROMOTES THE RIGHT TO FOOD**

#### **7.3.1.1 LAND-REFORM MATTERS**

Chapter 5 discussed the link between realising the right to food and land redistribution in South Africa. The submission made was that improving access to fertile land for food insecure people has an obvious role to play in realising the right to food in South Africa. In light of the fact that approximately 80% of the best agricultural land is still owned by white commercial farmers,<sup>846</sup> there is clearly much room for improvement in this regard. A contentious point exists in relation to land usage in the Eastern Cape in particular, where sizeable pieces of land have been and are being converted from usage for agriculture, primarily commercial livestock farming, into game farming.<sup>847</sup> The conversion of land from agricultural to game usage reduces the food-production of the area and hence is not a positive development from this perspective. However, as a counter-argument it could be put forward that the land in question was owned by commercial rather than subsistence farmers and hence the issue is really one of increased profits for such farmers rather than reduced food availability for subsistence farmers. This last point is supported by the fact that, as has been shown, South Africa’s food access problem is one of unequal supply rather than a shortage of production. However, notwithstanding the counter-argument, it is arguable that in the context of the finite amount of land available for redistribution, the conversion of land used for grazing into game farms is questionable. It is submitted that the needs of subsistence farmers to use such land to meet their own right to food needs should be considered a greater priority for government.

Brand notes that land dispossession in South Africa, in line with the requirements of sections 25(2) and 25 (3) of the Constitution, may only occur when various factors exist such as the

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<sup>845</sup> Ntlama “Unlocking the Future: Monitoring Court Orders in Respect of Socio- Economic Rights” Constitutional Law and Legal Theory Conference 5.

<sup>846</sup> Coomans and Yapko are citing 2002 figures provided by the Department of Land Affairs. Coomans and Yapko “A Framework on the Right to Food- An International and South African Perspective” 29. The same source also indicates that as of 2002. Approximately 14 million black South Africans were living in the infertile former homelands. *Ibid.*

<sup>847</sup> South African Government Website [www.gov.za](http://www.gov.za) (accessed on 3 January 2007).

payment of fair compensation and a consideration of all relevant considerations.<sup>848</sup> Brand argues that where land is dispossessed from people using it for subsistence agricultural purposes, this factor should affect the amount of compensation they should receive.<sup>849</sup> It is submitted that this argument is both logical and fair and that furthermore the dispossession of land from those who use the land as a means to feed themselves should be considered only as an absolutely last resort. This last submission is made on the basis that whilst land dispossession is sometimes needed in the interests of society at large, a dispossession which in so doing removes the owners' ability to feed themselves creates the need to provide such disposed persons with other means to provide themselves with adequate food.

Brand notes also the potential of land reform legislation, in particular the Prevention of Illegal Eviction and Unlawful Occupation of Land Act (PIE)<sup>850</sup> and the Extension of Security of Tenure Act (ESTA),<sup>851</sup> to make a significant impact to realising the right to food.<sup>852</sup> In effect these laws improve the rights of land occupiers over the land they are occupying. Whilst in apartheid South Africa racist legislation like the Illegal Squatting Act<sup>853</sup> made occupation short of ownership very tenuous, PIE and ESTA make great strides in improving the tenure of land occupiers. The link between PIE and ESTA and the right to food is that through having greater rights to lawfully possess land (and even become the owners thereof in terms of ESTA), there is the potential to use this improved security of tenure to improve food security through using the land for agricultural purposes. Such agricultural purposes would normally be of a subsistence variety, but could also take the form of selling produce which would then provide the means to secure other forms of food for the occupiers and their dependants. An example of a clear link between ESTA and the right to food is section 1 thereof whereby a restriction on a rural land occupier's right to grow crops or graze their livestock is considered an unlawful eviction in terms of that section. The case of *Ntshangase*

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<sup>848</sup> Brand "The Right to Food" in Brand and Heyns (eds) *Socio-Economic Rights in South Africa* 166.

<sup>849</sup> *Ibid.* Brand cites the case of *In re Kranspoort Community* 2000 (2) SA 124 (LCC) as support for this argument. In this case the claimants were found not to have received 'just equitable' compensation as the amount received had excluded their food production losses in the form of cultivation and grazing. Para 78.

<sup>850</sup> Act 19 of 1998.

<sup>851</sup> Act 62 of 1997.

<sup>852</sup> Brand "The Right to Food" in Brand and Heyns (eds) *Socio-Economic Rights in South Africa* 166.

<sup>853</sup> Act 52 of 1951.

*v The Trustees of the Tereblanché Gesin Familie Trust*,<sup>854</sup> where grazing rights and access of such livestock to water was denied to the applicants, illustrates this point.

Both ESTA and PIE require a court, before ordering the eviction of occupiers, to consider what is just and equitable in the circumstances of the matter.<sup>855</sup> Brand astutely argues that in light of the constitutional right to food, the court must take cognizance of the impact of an eviction order on the ability of the affected persons to feed themselves.<sup>856</sup> It is submitted that such an interpretation of PIE and ESTA accords with an appropriately purposive interpretation of these pieces of legislation in light of the right to food in both section 27 and 28 of the Constitution.

A further link between both ESTA and PIE and the right to food is the fact that the legislation requires the court before evicting occupiers to consider alternative land available to such persons to occupy upon eviction.<sup>857</sup> It is submitted that it is a perfectly reasonable interpretation of what alternative land options are available for a court to consider whether the alternative could be used for food production purposes. This link is made even more clearly in terms of the definition of suitable alternative accommodation in terms of section 1 of ESTA.<sup>858</sup> In terms of section 1 of ESTA suitable alternative accommodation relates to both where the evictees will live as well as the suitability of the alternative land for agricultural use. It is submitted that the only reasonable interpretation thereof is that where a household is dependent upon the land upon which they live to produce their food needs, then the suitability of alternative land to meet the equivalent food needs is of crucial importance as to whether an eviction should be granted. For example, where an occupying family grow crops (like mealies) to meet most of their own food needs, then alternative land would need to be arable and preferably suitable for growing similar crops for the right to food to be said to be promoted in such circumstances.

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<sup>854</sup> [2003] JOL 10996 (LCC). In this case this form of unlawful eviction was held to have occurred.

<sup>855</sup> ESTA Act 62 of 1997 ss 8 and 11 and PIE 19 of 1998 ss 4 to 6.

<sup>856</sup> Brand “The Right to Food” in Brand and Heyns (eds) *Socio-Economic Rights in South Africa* 167.

<sup>857</sup> ESTA Act 62 of 1997 ss 9 to 11 and PIE 19 of 1998 s 6.

<sup>858</sup> Brand argues that this provision provides for the state to mitigate interference with the right to food when such interference is called for. Brand “The Right to Food” in Brand and Heyns (eds) *Socio-Economic Rights in South Africa* 167. In Chapter 3 of this dissertation, on the ambit of the right to food, I discussed as part of the state’s right to food duties the duty to mitigate the harm caused when a denial of a right is necessary.

Brand notes that ESTA, PIE and the Labour Tenants Act<sup>859</sup> protect land rights as a way to protect the right to food against its denial by private bodies, just as denial by the state is protected against. This is done by limiting the ambit of lawful eviction and making the process for eviction subject to a number of safety measures to ensure that rights of occupiers are not unfairly denied.<sup>860</sup> In so doing, the ability of those who depend on the land upon which they live to produce the food they need to survive is safeguarded.

In relation to all the aforementioned land reform legislation and their links with food rights, it is argued that wherever possible interpretations of such legislation by both government functionaries and courts should be such as to promote access to adequate food for land occupiers.

### **7.3.1.2 ADMINISTRATIVE JUSTICE RELATING TO THE RIGHT TO FOOD**

In the light of section 33 of the Constitution, administrative action relating to the right to food must be lawful, reasonable and procedurally fair. This dissertation has repeatedly called for the conversion of rights into reality. Submissions on how to better realize the right to food would therefore be incomplete without the inclusion of proposals for improving administrative justice relating to government's food programmes. The value of such an analysis is increased if one accepts the link between substantive rights, including socio-economic rights, and their implementation. Put differently, the right to administrative justice and the entitlement to various socio-economic rights, including food, should work together to ensure that everyone has lawful, reasonable and procedurally fair access to the socio-economic right in question. The roll-out of feeding and nutrition programmes must be justly administered for such programmes to meet the basic food needs of hungry and malnourished people.

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<sup>859</sup> Act 3 of 1996.

<sup>860</sup> Brand "The Right to Food" in Brand and Heyns (eds) *Socio-Economic Rights in South Africa* 171. Again, reference is made to my discussion in Chapter 3 of what duties the right to food implies for the state. In that discussion it was shown that this duty requires all people to be protected from rights' violations by both state and non-state entities.

In relation to the requirement of lawfulness, there is plenty of case authority for successful challenges against unlawful administrative action.<sup>861</sup> Relying on this analogous case authority, it is clear that any person who qualifies for a state feeding programme, who is unlawfully denied access thereto, could successfully challenge such administrative action in court. A challenge along similar lines was found in the case of *Kutumela v Member of the Executive Committee for Social Services, Culture, Arts and Sport in the North West Province*.<sup>862</sup> Although the *Kutumela* case challenged the unlawfulness of a denial of a social relief of distress grant and not directly a state feeding programme, the fact that social relief of distress grants in practice take the form of food vouchers,<sup>863</sup> makes this challenge even more relevant under this heading of administrative injustice in relation to the right to food.

It was indicated in Chapter 4 that administrative action affecting fundamental rights involve a proportionality enquiry to ensure that the action is reasonable.<sup>864</sup> Such a test involves evaluating the advantages to be gained from taking a particular action against the disadvantages of not taking it. Clearly administrative decision-making relating to food also requires such a balancing act. In light of the fact that food is a basic requirement for human existence, this research has called for administrative action which promotes a broad and generous interpretation of food entitlement. By way of example, it is submitted that whenever an administrator is faced with a difficult judgement call as to whether someone does indeed qualify for a particular government food provision programme, then it is reasonable for such an applicant to benefit under the scheme.

The requirements of procedural fairness, including the right to adequate reasons for administrative decisions taken, were discussed at some length in Chapter 4 and will not be considered much further here. Suffice to say that administrative action relating to the right to food must follow the steps laid down for the action in question and be backed up by adequate reasons for the decision. Due to the fact that hunger and malnutrition have such serious

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<sup>861</sup> For example, *Bacela v MEC for Welfare (Eastern Cape Provincial Government)* [1998] 1 All SA 525 (E).

<sup>862</sup> Case 671/2003.

<sup>863</sup> Liebenberg and Tilley *Poverty and Inequality Hearings: Social Security Theme* (background paper for South African National Non-Governmental Organisation (SANGOCO), the South African Human Rights Commission and the Commission for Gender Equality 11.

<sup>864</sup> Academic authority for this submission is De Ville, J *Judicial Review of Administrative Action in South Africa* 215. In Currie & De Waal *The Bill of Rights Handbook* 677. Case authority for such a proportionality enquiry is *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (4) SA 490 (CC) at para 44.

consequences, including the possibility of death, it is argued that the procedural fairness requirement must involve the process being handled as expeditiously as is reasonably possible. For example, if an applicant for a social relief of distress grant were to have to wait unduly long for the reasons for her being denied the grant, such an applicant may die of hunger or at least suffer great hardship before being able to challenge the administrative decision taken in court.<sup>865</sup>

There is thus a clear scope for our courts to ensure administrative justice in relation to all state food programmes. This accords with the Chaskalson P's finding in *Pharmaceutical Manufacturers Association of South Africa; In re: Ex Parte Application of the President of South Africa* that:

“courts no longer have to claim space and push boundaries to find means of controlling state power. The control is vested in them under the Constitution ...”.<sup>866</sup>

### **7.3.1.3 INCOME CREATION MEASURES**

In Chapter 5 it was indicated how the ability to earn an income is a key way for people to be able to feed themselves in that the income earned can be used to directly procure food or provide the means to produce food (for example when income earned is used to buy farming implements). On this premise it is clear that the promotion of income generation is an obvious method of indirectly ensuring that people are provided with the food they require. Actual methods by which income generation may be promoted, which were touched on briefly in Chapter 5, is considered beyond the scope of proposals for this legal analysis and will therefore not be taken further here.

## **7.3.2 ENFORCEMENT STRATEGIES**

### **7.3.2.1 CREATIVE JUDICIAL REMEDIES**

This research has shown how the right to food has often failed to be properly enjoyed in reality. The discussion in Chapter 2 of socio-economic rights generally indicated how, despite

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<sup>865</sup> The *Kutumela* decision, discussed earlier, can be used as authority for this submission. Whilst this case was actually decided upon the basis of unlawfulness, it is clear that the undue delay in handling the whole process was also procedurally unfair. *Kutumela v Member of the Executive Committee for Social Services, Culture, Arts and Sport in the North West Province* Case 671/2003.

<sup>866</sup> 2000 (2) SA 674 (CC) Para 45.

being fully justiciable rights as opposed to mere values, socio-economic rights have not always been properly protected or even adequately recognised by the South African courts, even in the constitutional era.<sup>867</sup> In addition, the enforcement of socio-economic rights is faces the challenge of state resource limitations imposed by the internal limitations of section 27(2) of the Constitution. Thus implementing the right to food, like other socio-economic rights, is a challenging task for the courts. What is called for, therefore, is creative judicial decision making which both acknowledges resource limitations whilst at the same time converts the rights in question into reality. Such judicial pronouncements would accord with foreign case authority<sup>868</sup> in the influential Canadian decision of *R v Big M Drug Mart Ltd* which calls for a purposive and generous approach to the interpretation of constitutional rights which are intrinsically linked with effective protection of rights to ensure the full advantage of the applicable right.<sup>869</sup> Scott and Alston argue that applying a purposive approach to the right to food means that court decisions should reflect the need to avoid starvation and suffering.<sup>870</sup> In order to ensure the adoption of such a purposive and generous approach, it is argued that our courts with constitutional jurisdiction need to come up with creative means to promote the better enforcement of the right to food. What follows is a consideration of possible innovative judicial remedies apposite to the right to food. Before specific remedies are mooted a consideration of how such remedies will impact on the traditional conception of separation of powers amongst the different arms of government will be considered. This section will begin with the latter discussion as to propose judicial remedies which would unjustifiably usurp the legislature or executive's functions would be a pointless exercise.

A discussion of the separation of powers doctrine was made in Chapter 2 of this dissertation where it was noted that it is conventionally the role of the executive to make state policy. In calling for creative court decisions one must be aware of a possible incursion by the courts into the normal realm of the executive arm of the state. Such a reconception of the separation of powers was envisaged by the Constitutional Court in the *TAC* case which held that the courts may make policy when the circumstances necessitate it and the normal mechanisms of

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<sup>867</sup> For example, in the *Soobramoney* case (*supra*), Justice Madlala describes socio-economic rights as ideals which should be strived for. At para 42.

<sup>868</sup> S 39 of the Constitution allows for consideration of foreign law in interpreting a right in the Bill of Rights.

<sup>869</sup> (1985) 18 DLR (4th) 321.

<sup>870</sup> Scott & Alston "Adjudicating Constitutional Priorities in a Transnational Context: A Comment on *Soobramoney's* Legacy and *Grootboom's* Promise" 206 at 217 to 218.

a democratic society do not solve the problem.<sup>871</sup> The court held further that since the Constitution in section 7(2) requires the state to “respect, protect, promote, and fulfil the rights in the Bill of Rights” any intrusion by the court into the executive’s realm:

“is an intrusion mandated by the Constitution itself”.<sup>872</sup>

The *TAC* decision thus indicates that the courts can create policy for government, albeit only in exceptional circumstances.<sup>873</sup> Hopkins argues that exceptional circumstances which would warrant such intervention include urgency and the existence of vulnerable people unable to help themselves.<sup>874</sup> Hopkins aptly refers to this as a “South Africanised doctrine of the separation of powers”, which is more apposite to meet South Africa’s particular socio-economic needs.<sup>875</sup> The importance of this trend *vis-a-vis* the right to food is that there would now appear to be precedent for the courts to create a reasonable food policy should it find the policy and programmes in existence to be unreasonable. This submission is made on the basis that analogous with the facts in *TAC (I)*, those suffering from hunger and malnutrition cannot wait until the next election to exercise their displeasure with government policy held to be unreasonable. Furthermore, there are vulnerable groups, such as hungry children, who do not have the democratic platform in which to effectively express their opinion on government policy; the courts might well have to speak for them. Thus existing problems relating to the right to food can be considered exceptional enough to warrant the courts to issue remedies which have an impact on government’s food policy. What follows is a discussion of the form which such remedies could take.

There is a broad scope to come up with creative court remedies relating to the right to food in light of the wide guidelines provided in sections 38 and 172(1)(b) of the Constitution. These sections provide respectively for a court with constitutional jurisdiction to make any order that is “just, fair or equitable” and to grant “appropriate relief” for a threat to or actual infringement of a fundamental right. The question then remains to identify apposite judicial

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<sup>871</sup> *TAC* (*supra*) at para 98 to 100.

<sup>872</sup> *TAC* (*supra*) at para 99.

<sup>873</sup> Hopkins “Democracy in a Post-TAC Society” 17.

<sup>874</sup> Firstly, in relation to HIV/ Aids, the urgency of the required treatment well before the next election. Secondly, newborn babies have no meaningful access to the democratic process because they cannot yet vote. *Ibid.*

<sup>875</sup> *Ibid.*



remedies to best realise the right to food in the light of the wide parameters provided in the Constitution. Such an analysis takes on greater significance if one accepts the view put forward by prominent legal academics that there remains a lack of effective remedies to date to give real meaning to the concept of “appropriate relief”, especially in relation to socio-economic rights.<sup>876</sup> A useful starting point is a consideration of the forms of relief indicated by Justice Ackermann in *Fose v Minister of Safety and Security* as follows:

“appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a *declaration of rights*, an *interdict*, a *mandamus* or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced.”<sup>877</sup> (Own emphasis added).

A declaration of rights which indicates the nature and extent of a particular right may be a useful starting point in light of the virtually untested nature of the right to food in South Africa. Thus, if a person unable to feed herself goes to court indicating that her right to food is being denied, it may be useful for the court hearing the matter to delineate the nature of the applicant’s right to food by way of a declaration of rights. However, just as this dissertation has repeatedly noted the need for rights on paper to be turned into reality, so a declaration of rights would appear an insufficient remedy without some further indication of how the right should be realised in practice.

The argument in the previous paragraph for more practical judicial remedies pertaining to the right to food would appear to be met through the granting of an interdict or mandamus. These remedies would require the relevant government functionary (or even private individual if that were the case) to cease their unconstitutional conduct or to commence what they should be doing to realize the right.<sup>878</sup> However, bald calls for our courts with constitutional jurisdiction to provide remedies in the form of interdicts or mandami without indicating what must be avoided or done, again fails to take the matter sufficiently further. Here Trengrove provides very useful guidance in suggesting that that appropriate relief for socio-economic rights violations would include an order directing the legislature and executive to bring about modification defined in terms of their aims and then to retain a supervisory jurisdiction to

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<sup>876</sup> This view is strongly espoused in Currie and De Waal *The New Constitutional and Administrative Law: Constitutional Law* 399.

<sup>877</sup> 1997 (3) SA 786 (CC).

<sup>878</sup> The *Grootboom* judgment provides a precedent for such a remedy. Here the Constitutional Court issued a declaratory order requiring the state to meet its s 26(2) housing obligations. *Grootboom* (*supra*) para 95.

supervise the implementation of those changes.<sup>879</sup> Trengrove's call for the courts' remedies to ensure what the legislature and executive are actually doing accords with their aims is a logical way of ensuring that the full ambit of the right to food, as discussed at length in Chapter 2, is realised.

Perhaps even more useful is the idea of supervisory jurisdiction of government compliance with the court order handed down. As was well illustrated in the *Grootboom* case, there is always the danger of government non-compliance with the order of court.<sup>880</sup> In *Grootboom* there was inadequate follow-up to ensure state compliance with the court's wishes. This ineffectiveness was shown by state not having complied with the court order a full two years after the judgment in *Grootboom*.<sup>881</sup> As was noted in Chapter 6, the failure by the court to exercise supervisory jurisdiction is a conspicuous gap in the precedent of *Grootboom* towards acceptable socio-economic rights jurisprudence in that those who launched the application did not see any tangible improvement in their circumstances within an acceptable period of time. In order to prevent this weakness of the *Grootboom* judgment being perpetuated, it is submitted that any court order relating to a successful right to food challenge must indicate in clear terms by whom and how enforcement of the order will occur so as to ensure compliance with its provisions. I would also argue for the need for the supervision of government compliance to be checked on an ongoing basis by an impartial organization with the power to independently gather information. Such a "watchdog" organization should thereafter be required to report back to the court which handed down the order on the degree of compliance with the order at a particular date. The watchdog should also be mandated by the court order to revert back to the court at an earlier date in instances where government non-compliance has serious or urgent repercussions for the successful applicants. As was discussed in Chapter 6, the SAHRC is both well placed and constitutionally empowered to adequately perform such a supervisory function.<sup>882</sup>

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<sup>879</sup> Trengrove "Judicial Remedies for Violations of Socio-economic Rights" 8 at 9.

<sup>880</sup> *Supra*.

<sup>881</sup> Pillay "Implementation of *Grootboom*: Implications for the Enforcement of Socio-economic Rights" 277 Pillay rightly contends that the *Grootboom* judgment has been restrictively interpreted with the consequence that there has been seemingly little positive policy change in favour of vulnerable groups in crisis situations.

<sup>882</sup> Nthai, for example, sees the Commission as being at the forefront of ensuring that both government and non-government actors combat poverty effectively. Nthai "Implementation of Socio-economic Rights in South Africa" 41. The SAHRC's powers are laid out in s 184 of the Constitution.

My earlier suggestion that the appointed supervisory watchdog have the power to independently gather information requires elaboration. It is necessary that the government department whose compliance with a court order is being assessed does not form part of its own assessment. As was discussed in Chapter 6, such impartial assessment is vital for the sake of accountability and impartiality in the process. The lack of enforcement measures and monitoring in *Grootboom* meant that whilst the SAHRC was given supervisory jurisdiction in theory, it could not properly perform this function due to it not receiving all the requisite information pertaining to the implementation of the order across the country.<sup>883</sup> In order to prevent the repeat of such a situation in an analogous successful right to food challenge, it is suggested that the supervisory body be empowered to gather information on government compliance on its own, without having to rely on receiving government reports to do this.

It is submitted that the aforementioned supervision process could be further tightened up so as to ensure greater compliance. It makes sense for the court, when handing down its order, to indicate exact deadlines for performance by government.<sup>884</sup> For example, was a court to rule that existing government feeding in schools was insufficient, then particular timeframes should be provided by which particular targets must be reached. In providing such timeframes the court would need to consider the resource limitation proviso of section 27(2). Govindjee cites a lack of timeframes for state compliance as a significant weakness of the *Grootboom* judgment.<sup>885</sup> There is an obvious link between timeframes for compliance with a court order and monitoring of its fulfilment, in that it is significantly easier to monitor compliance if a timeframe for fulfilment of different parts of the order has been laid down by the court. To elaborate with an example, in the event of flooding victims successfully approaching a court in arguing that there are no satisfactory feeding measures in such an emergency situation, the question then remains how long the government has to introduce a satisfactory procedure. This lacuna is easily filled by the court order indicating timeframes for compliance. The need for court orders relating to the right to food, or any other socio-economic right for that matter, to include timeframes for conformity is heightened by the poor track record of the government in often failing to satisfy court orders relating to social

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<sup>883</sup> Bilchitz “Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-economic Rights Jurisprudence” 26.

<sup>884</sup> The creation of timeframes for the state to meet various aspects of its right to food obligations is reconsidered later in this Chapter under proposed framework legislation.

<sup>885</sup> Govindjee *The Constitutional Right to Social Assistance as a Framework for Social Policy in South Africa: Lessons from India* 99.

grants within a reasonable period.<sup>886</sup> The need for urgent and strictly enforced timeframes is particularly the case with the right to food where an unreasonable delay in compliance may have dire consequences, namely further hunger, malnutrition and even death. The creation of timeframes for government compliance forms a key part of framework legislation on the right to food which is considered again later in this Chapter.

### 7.3.2.2 EFFECTIVE ENFORCEMENT OF COURT ORDERS

This section continues from the earlier proposals on creative court orders which included some discussion on enforcement of such orders by way of monitoring compliance. The South African Human Rights Commission has called for monitoring of whether the state is progressively realising the right to food.<sup>887</sup> The above proposals on effective judicial remedies to ensure the right to food called for the court orders themselves to make provision for their own enforcement. Putting into place measures to monitor government compliance with court orders is linked with the issue of creative judicial remedies on the right to food in that the best court orders in the world count for nothing if they are not implemented. I commented above that the *Grootboom* decision failed to order adequate measures to ensure that the court's order would be properly monitored so as to ensure proper government compliance with the court's requirements. To recap, the court indicated that in the circumstances the state had fallen short of its right to housing obligations and ordered the state to remedy this. The court failed, however, to create satisfactory ways of ensuring that the remedial state action was satisfactory.<sup>888</sup> The potential use of the SAHRC to perform this task was discussed in the *Grootboom* judgment, but not adequately done in practice. Similarly, in any future court order relating to the right to food, it is submitted that the order itself must contain provisions which ensure that the court is able to determine whether there has been compliance by government with its order. Nthai sensibly suggests that effective enforcement of such an order requires the court to indicate how monitoring of compliance will occur, timeframes for compliance and what should be contained in a report on the

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<sup>886</sup> For example, *Bacela v MEC for Welfare (Eastern Cape Provincial Government)* [1998] 1 All SA 525 (E). Other case examples, especially in the Eastern Cape of such a tardy response by government to court orders are discussed in Chapter 5 of this dissertation and in much more detail by Plasket. Plasket "Administrative Justice and Social Assistance" 497 to 501.

<sup>887</sup> South African Human Rights Commission *The Right to Food* Fifth Economic and Social Rights Report Series, 2002/2003 (2004) 3 and 10.

<sup>888</sup> The court did indicate that a court can require the state to give an account of its progress in implementing those measures. *Grootboom* para 42. However, this point was not taken far enough, in that no indication was made of a report-back to the court of the implementation of the order.

measures taken to follow the order.<sup>889</sup> Without such provisions the value of the court order itself is highly questionable in that in theory the right to food may be taken forward but in practice those affected would continue to suffer.

## 7.4 EDUCATION

Ntlama argues that in addition to a lack of monitoring, a lack of awareness of the legal process and a lack of financial means are other reasons for socio-economic rights not being given affect to.<sup>890</sup> This sentiment is echoed in a report of the South African Human Rights Commission which indicates that the difficulty in addressing socio-economic rights violations is compounded by widespread ignorance of what such rights entail.<sup>891</sup> Ntlama's above comment could relate to both a lack of basic legal education in affected communities and insufficient resources for organizations like the Legal Resources Centre (LRC) to assist such indigent individuals. In relation to the right to food it is submitted that there is a need for widespread education on all aspects of the right, including enforcement and monitoring of judgments, and for NGO's like the LRC to be properly funded to be able to assist such needy individuals throughout the legal process. It is submitted that improved education does indeed hold the key to various aspects of the right to food. The South African Human Rights Commission indicates that the state's duty to promote the right to food includes widespread education on the ambit of the right.<sup>892</sup> What follows are some envisaged ways in which improved education may result in better fulfillment of the right to food in South Africa.

Chapter 3 indicated that the ambit of the right to food includes food of a nutritionally adequate quality and quantity for a person's physical and mental well-being. Adequate education is required to know what good nutrition entails. Vidar correctly identifies education as one of the key links in a chain of satisfactory nutrition in that a lack of education may negatively affect one's right to food.<sup>893</sup> Brand points out that education allows a person to eat

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<sup>889</sup> Nthai "Implementation of Socio-economic Rights in South Africa." 41

<sup>890</sup> Ntlama "Unlocking the Future: Monitoring Court Orders in Respect of Socio- Economic Rights" 3.

<sup>891</sup> South African Human Rights Commission *The Right to have Access to Sufficient Food* Fourth Economic and Social Rights Report 2001/2002 (2003) 37.

<sup>892</sup> The South African Human Rights Commission *The Right to Food* Fifth Economic and Social Rights Report Series, 2002/2003 (2004) 7.

<sup>893</sup> Vidar "Towards Voluntary Guidelines on the Right to Food" 13.

more nutritiously by knowing the nutritional value of particular foodstuffs as well as how to store and prepare the food so as to maximise the nutritional value received.<sup>894</sup>

Associated with the previous paragraph is the need for education on the link between poor nutrition and food insecurity and HIV/ Aids susceptibility. Engh's research shows that food insecurity and malnutrition increase the susceptibility of contracting HIV and the more rapid development of HIV into Aids.<sup>895</sup> Chapter 3 showed how notwithstanding improved HIV/Aids medical treatment the scourge of the pandemic remains and worsens. It is submitted that more widespread knowledge of the use of good nutrition as a means to counter HIV and Aids can, together with the improved roll-out of anti-retrovirals, play a positive roll in the fight against HIV and Aids.

This concluding Chapter has already noted how improved provision of arable land to those susceptible to food insecurity and hunger is an obvious way of improving access to adequate food in South Africa. However, for such land redistribution to have a meaningful role in improving food production and hence decreasing food insecurity for such people, it is necessary for the recipients to be properly trained in the appropriate farming methods and for them to have the requisite farming implements and technology. Such land holders obviously also require the requisite training to properly use the technology and equipment.

By creating greater capacity to earn a reasonable income, education can be said to promote the right to food in that the money earned can be used to procure satisfactory food. Being properly fed is also necessary for creating an environment conducive to learning. A hungry or malnourished child, if she attends school at all, is unlikely to learn properly. The existing school feeding scheme, called the National School Nutrition Programme, only involves the provision of primary school learners in particular identified poverty-stricken areas with a standardised nutritious meal at school.<sup>896</sup> Furthermore, there is no provision in government feeding programmes for high school learners nor, with the exception of Gauteng's

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<sup>894</sup> Brand "The Right to Food" in Brand and Heyns (eds) *Socio-Economic Rights in South Africa* 164.

<sup>895</sup> Engh "Developing Capacity to Realise Socio-Economic Rights. The Example of HIV/Aids and the Right to Food in South Africa" 3.

<sup>896</sup> South African Human Rights Commission *The Right to Food* Fifth Economic and Social Rights Report Series, 2002/2003 (2004) 3 and 28.

Community-Based Nutrition Programme,<sup>897</sup> for pre-school learners. It is trite that meaningful learning is very unlikely to occur when learners are hungry or malnourished in the classroom.<sup>898</sup> It is submitted that to properly meet the right of children to basic nutrition in section 28(1)(c) of the Constitution, such schemes need to be extended to any hungry or malnourished learners.

It is submitted that the government's current school feeding scheme could be expanded in a number of ways to do better feed hungry learners and in so doing realize their right to food as contained in sections 27 and 28 of the Constitution.<sup>899</sup> The need for an expanded programme finds support in the "Right to Food Report" of the SAHRC which showed that 151615 fewer learners benefited from the scheme in 2002/2003 in comparison with the previous year.<sup>900</sup> The fact that many school-going children are hungry or malnourished is shown by alarming statistics that 101152 children in South Africa were hospitalised for severe malnutrition in the SAHRC's 2002/2003 reporting period.<sup>901</sup>

The National School Nutrition Programme can be criticised for taking an over-simplified approach to the selection of schools to benefit under the programme. The current criteria used in this selection process contemplates the previously disadvantaged status of a school, primarily on the basis of its locality.<sup>902</sup> It is submitted that a more investigative approach needs to be taken to identify all learners requiring feeding at school. As a starting point the programme needs to be extended to high schools. For primary and high school learners the more analytical selection process envisaged would adopt more individualised mechanisms for ensuring that all hungry or malnourished learners are fed at school. In relation to the latter point it is stressed that particular learners in a school may be hungry or malnourished despite other learners in the same school being adequately fed.

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<sup>897</sup> South African Human Rights Commission *The Right to Food* Fifth Economic and Social Rights Report Series, 2002/2003 (2004) 31.

<sup>898</sup> Not surprisingly, research has shown that hunger and malnutrition negatively affect mental and physical health as well as productivity. Olivier; Smit and Kalula *Social Security: A Legal Analysis* 546.

<sup>899</sup> Such learners benefit from the right to basic nutrition in s 28(1)(c) due to their status as children, in addition to the right to food for all in s 27.

<sup>900</sup> South African Human Rights Commission *The Right to Food* Fifth Economic and Social Rights Report Series, 2002/2003 (2004) 3.

<sup>901</sup> South African Human Rights Commission *The Right to Food* Fifth Economic and Social Rights Report Series, 2002/2003 (2004) 3.

<sup>902</sup> Khoza "Realising the Right to Food in South Africa: Not by Policy Alone- A Need for Framework Legislation" 679.

The SAHRC Report cited earlier also indicated that during the reporting period there was a three month period in the Eastern Cape when the National School Nutrition Programme did not run at all.<sup>903</sup> Such non-delivery of services must clearly be avoided at all costs, and when it does occur, can and ought to be the subject of an urgent court challenge.

#### **7.4.1 PARALEGAL ADVICE OFFICES**

Adjunct to the proposed role of improved education on the right to food is the role of community-based paralegal advice offices in this process. Advice offices which are staffed by paralegals, amongst numerous other functions, provide indigent clients (especially in rural and poor areas) with rights education and basic legal assistance.<sup>904</sup> The geographical location and nature of the work which advice offices perform makes their paralegal employees well suited to run workshops on the ambit of the right to food as well as government food programmes available. Plasket recognizes the useful educative and assisting role of advice offices by noting that:

“They are also more in touch with the real problems of people than lawyers can ever hope to be.”<sup>905</sup>

However, paralegals in advice offices need to receive adequate training and backup themselves before they are able to properly disseminate this information to members of the community and assist further. Furthermore, paralegals are often involved in lobbying government to amend laws and policies in ways that facilitate positive social change.<sup>906</sup>

The Rhodes University Legal Aid Clinic (RULAC) in Grahamstown, in the Eastern Cape, provides a method of paralegal education and co-operation which can serve as a model for other parts of the country. What RULAC has done is to set up a network of relationships, which it terms clusters, between itself and advice offices in the Eastern Cape and amongst the

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<sup>903</sup> South African Human Rights Commission *The Right to Food* Fifth Economic and Social Rights Report Series, 2002/2003 (2004) 3.

<sup>904</sup> National Community-Based Paralegal Association. Accessed at [www.paralegaladvice.org.za](http://www.paralegaladvice.org.za) on 21/01/2007.

<sup>905</sup> Plasket “Accessibility Through Public Interest Litigation” in Corder and Maluwa (eds) *Administrative Justice in Southern Africa* (1997) 124. It is hard to think of a problem more real to people than that of having insufficient access to food.

<sup>906</sup> *Ibid.*



advice office themselves.<sup>907</sup> RULAC assists the advice offices in three main ways. Firstly, week-long certificates of competence are currently offered to paralegals on areas of law frequently encountered by the offices. Secondly, on-site visits are made to the advice offices by RULAC staff members to assess competence in areas of training received and to assist the advice offices with their clients' problems. Finally, linked with the second role, the paralegals are able to contact RULAC professional legal staff, telephonically or in a similar fashion for advice in urgent matters.<sup>908</sup> Such a relationship between university legal aid clinics, or similarly placed legal service providers, and advice offices could appropriately be applied to promote and protect the right to food in the following envisaged ways. Firstly, paralegals could receive training on the extent of the right to food, the existing food programmes available and protection of the right to food. Once trained, the paralegals would also be endowed with greater knowledge to lobby government to introduce some of the new programmes and laws identified in this research as ways of improving the realization of the right to food, such as the Basic Income Grant and food framework legislation. The on-site visitation of advice offices and other contact between the organizations would assist in identifying potential applicants for court challenges on government's existing food policies or unacceptable roll-out of government programmes. It is therefore submitted that with the necessary training and logistical support paralegals in advice offices can play a meaningful role in the realization of the right to food.

The above discussion contemplates the role of advice offices, specifically, in raising awareness in communities on the right to food. That is not to say that improved awareness of the right to food cannot be raised by other organizations or programmes. For example, the Street Law programme has launched massive rights awareness initiatives of many years.<sup>909</sup> Coomans and Yapko call for an educational right to food campaign to be launched on a large-scale in the media. They note how an analogous campaign was launched by the Treatment Action Campaign in relation to anti-retroviral treatment of HIV and Aids.<sup>910</sup> Such initiatives often face the challenges of people not knowing what their rights are, and even when they are aware of their rights, a lack of money to protect those rights via legal channels. Ntlama incisively suggests that these problems can be tackled through improved organization of

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<sup>907</sup> Rhodes University Legal Aid Clinic. Accessed at [www.ru.ac.za/academic/faculties/law](http://www.ru.ac.za/academic/faculties/law) on 22/01/2007.

<sup>908</sup> *Ibid.*

<sup>909</sup> Street Law, South Africa's Website. Accessed at [streetlaw.org.za](http://streetlaw.org.za) on 22/01/2007.

<sup>910</sup> Coomans & Yapko "A Framework on the Right to Food- An International and South African Perspective" 33.

interested groups and by fundraising.<sup>911</sup> Whilst Ntlama does not explain these solutions further, they could involve collaboration between non-governmental organizations for a more united approach to socio-economic rights enforcement, and the raising of money to fund strategic litigation.

## **7.5 POSSIBLE NEW GOVERNMENT PROGRAMMES**

This concluding Chapter has thus far limited itself to ways of better realizing government's *current* approach to South Africa's food challenges: be it through a court challenge or through novel interpretations of other rights and programmes in ways which better promote the right to food. What follows are two new policies which, it is submitted, will improve access to sufficient food for those in great need.

This discussion will be limited to framework food legislation and the Basic Income Grant as various other measures, such as a better utilization of social relief of distress grants, have received adequate discussion in earlier chapters. The need for further discussion on social relief of distress grants is also reduced since the creation of the Draft Procedure Manual for Social Relief of Distress.<sup>912</sup> It is nonetheless worth reiterating the crucial role which the social relief of distress grants can have in allowing food provision in times of emergency. The urgent need for food provision in times of emergency is recognised by the seemingly inadequate measures government has in place at present.

### **7.5.1 THE RATIONALE FOR CALLING FOR NEW PROGRAMMES**

There is research to show that food insecurity, hunger and malnutrition are experienced in South Africa.<sup>913</sup> In light of the fact that there is enough food in this country to sufficiently feed everyone, government's existing response to this country's food challenges would

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<sup>911</sup> Ntlama "Unlocking the Future: Monitoring Court Orders in Respect of Socio- Economic Rights" 3.

<sup>912</sup> Accessed at [www.gov.za](http://www.gov.za) on 1 November 2006. November 2005 and February 2006 drafts of the Procedure Manual for Social Relief of Distress exist.

<sup>913</sup> It has been estimated that 36% of the South African population (which equates to more than 14 million people) are vulnerable to food insecurity. Khoza "Realising the Right to Food in South Africa: Not by Policy Alone- A Need for Framework Legislation" 664. About 20 to 25% of South African pre-school children and 20% of primary school learners are chronically malnourished. Engh "Developing Capacity to Realise Socio-Economic Rights. The Example of HIV/Aids and the Right to Food in South Africa" 5.

appear inadequate. It is on this basis that the proposal of framework legislation on food is made.

This research has noted the glaring gap in the existing social assistance grant network for those who are unable to find work yet do not qualify for one of the existing grants based on age or ill-health. It is in this context that the introduction of a Basic Income Grant (BIG) is called for.

## **7.5.2 FRAMEWORK LEGISLATION**

The large number of issues raised in this dissertation, many of which warrant further research of their own, show how complicated the issue of realizing the right to food actually is. Chapter 5 discussed the possibility of a more co-ordinated and comprehensive response to South Africa's numerous food challenges which could be the subject of framework legislation. This section will briefly highlight some of the main arguments in favour of creating food framework legislation before systematically proposing how this could successfully operate in reality.

Coomans and Yapko argue that framework legislation on food in South Africa is called for in light of what they consider to be a lack of coherent law and policy on food. They also deem existing food programmes to be inadequate, especially the inaccessibility of such programmes to those in most need.<sup>914</sup> It is submitted that such legislation is called for notwithstanding the improvements in the state's response to the food challenges evidenced by the National Food Security Bill and the Integrated Food Security Strategy discussed in Chapter 5. It is worth repeating the description of framework legislation as aiming to provide a single, all-encompassing and co-ordinated means for implementing national policy and strategy relating to a particular right.<sup>915</sup> Framework law on food should cover the complete range of matters associated with the right to create a holistic, harmonized response to its challenges.<sup>916</sup> A final, and I would argue definitive, endorsement for introducing framework

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<sup>914</sup> Coomans & Yapko "A Framework on the Right to Food- An International and South African Perspective" 31.

<sup>915</sup> Khoza "Realising the Right to Food in South Africa: Not by Policy Alone- A Need for Framework Legislation" 670.

<sup>916</sup> Coomans & Yapko "A Framework on the Right to Food- An International and South African Perspective" 20.

legislation on food is the Constitutional Court's recognition in *Grootboom* of framework legislation as a reasonable method for effective and inclusive realization of a right.<sup>917</sup> When one considers that the *Grootboom* case acknowledged the significant strides made by government in terms of policy formulated to meet housing needs, then the acknowledgement of framework legislation as a means of socio-economic rights enforcement is even more applicable to enforcement of food rights where government policy appears to be less well coordinated.

It is easy to support the aforementioned academic conceptualizations of framework legislation. However, going beyond these generic descriptions, it is much more challenging to provide greater detail on the actual form which food framework legislation in South Africa should take. Brief submissions on the four accepted parts of framework legislation (namely evaluation, drafting, implementation and monitoring) will be made.<sup>918</sup>

The evaluation stage needs to identify all aspects of the right to food. This must be done as the framework legislation, by definition, involves a holistic response to the issues. Such an analysis will be protracted and is likely to have significant costs both financially and in terms of man-hours. An example of the challenges posed at this first phase would be the need for a detailed analysis of the extent of food security, hunger and malnutrition in South Africa. It is impossible to create workable solutions in the framework legislation itself without knowing the extent of the challenges faced. A necessary consequence of the massive scale of the evaluation stage is that were government to decide to introduce framework legislation for food, its creation would be a lengthy process.

It is suggested that the greater input from the public and particular interested parties should be sought in the drafting stage of the process. This accords with the submission of Coomans and Yapko that civil society has a central role to play in policy creation and planning.<sup>919</sup> A key part of the drafting (and the process as a whole) is to translate the right on paper into food on the tables of all living in South Africa. The creation of guidelines and targets must form a

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<sup>917</sup> *Grootboom (supra)* para 40.

<sup>918</sup> Khoza writes that these are the four generally recognized stages of framework law. Khoza "Realising the Right to Food in South Africa: Not by Policy Alone- A Need for Framework Legislation" 672.

<sup>919</sup> Coomans & Yapko "A Framework on the Right to Food- An International and South African Perspective" 24.

central tenet of the legislation.<sup>920</sup> Such guidelines and targets could cover such things as the quantities of particular foodstuffs required to meet South Africa's needs.

Linked with the creation of targets is the implementation of the legislation. Implementation is aided by the framework legislation itself which provides specific methods of implementation, including powers, policies and implementation benchmarks.<sup>921</sup> It is in this context that there is a potential weakness of framework legislation being less well placed than the executive for dealing with policy issues.<sup>922</sup> Somehow the legislation will have to make provision for changing circumstances, including state resource limitations which could arise in the future.<sup>923</sup>

Khoza argues that the monitoring stage is made significantly easier due to the set targets in the framework legislation.<sup>924</sup> This dissertation has earlier called for monitoring to be done by an independent and impartial body which has the means to gather information on compliance on its own. To repeat, the monitoring organ should not be reliant on government departments to report on their compliance with set rules.<sup>925</sup> The proposals made earlier in this Chapter on monitoring, creative judicial remedies and effective enforcement of judgments apply *mutatis mutandis* to the monitoring of, remedies for non-compliance with, and enforcement of, framework legislation. This last submission is made on the basis that the requirements of framework legislation on food are analogous to a court order *vis-à-vis* "ordinary" food legislation or programmes.

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<sup>920</sup> Coomans & Yapko "A Framework on the Right to Food- An International and South African Perspective" 22.

<sup>921</sup> Khoza "Realising the Right to Food in South Africa: Not by Policy Alone- A Need for Framework Legislation" 673.

<sup>922</sup> Coomans & Yapko "A Framework on the Right to Food- An International and South African Perspective" 24.

<sup>923</sup> The creation of food framework legislation would obviously not remove the (necessary) state resource limitation caveat found in s 27(2) of the Constitution.

<sup>924</sup> Khoza "Realising the Right to Food in South Africa: Not by Policy Alone- A Need for Framework Legislation" 673.

<sup>925</sup> See the proposals made in Chapter 6 relating to the SAHRC better performing its monitoring role.

### 7.5.3 THE BASIC INCOME GRANT

It is acknowledged that the Basic Income Grant (BIG), proposed by the Coalition of South Africans for a Basic Income Grant,<sup>926</sup> has been rejected as an option by the current South African government.<sup>927</sup> However, the lack of social assistance to procure food and other necessities for those who do not fall into the existing social assistance system provided by the state, surely calls for a reconsideration of this stance.<sup>928</sup>

The introduction of BIG will admittedly be a mammoth task requiring the allocation of significant funds in the national budget; something which government has to date considered neither affordable nor feasible to implement.<sup>929</sup> However, it is submitted that the potential advantages of introducing BIG outweigh these challenges. The fact that government should reconsider its current rejection of BIG is supported by the research findings of organizations and bodies particularly well placed to comment on social security social and assistance interventions. For example, the Taylor Commission recognized the potential of BIG, more than any other potential social protection initiative, to alleviate the worst consequences of poverty and unemployment and to advance development.<sup>930</sup> Furthermore, the findings of the SAHRC are that BIG should continue to be considered as a means to fight poverty, especially for those of a working age.<sup>931</sup> It is submitted that the introduction of BIG would go some way towards the state meeting the SAHRC's calls for urgent state intervention to ensure food provision in severe situations.<sup>932</sup> It is argued that unemployed individuals who receive no form of social assistance quite clearly find themselves in what can be termed severe situations. BIG could also be considered an urgent state response to the needs of other food insecure persons, whose ability to feed themselves may be hampered by climatic and other natural disasters as well as man-made crises such as political volatility and being the victims

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<sup>926</sup> The Coalition of South Africans for a Basic Income Grant. Accessed at [www.drc.org.za/docs](http://www.drc.org.za/docs) on 5 December 2006.

<sup>927</sup> BIG was rejected by Finance Minister, Mr Trevor Manuel, in his *2004 Budget Speech*. Accessed at [www.gov.za/speeches](http://www.gov.za/speeches) on 30 March 2006.

<sup>928</sup> See Chapter 5 for a more detailed discussion of arguments for and against the introduction of BIG.

<sup>929</sup> BIG Financing Group *Breaking the Poverty Trap: Financing a Basic Income Grant in South Africa* 34 to 45.

<sup>930</sup> "Transforming the Present – Protecting the Future: Report of the Committee of Inquiry into Comprehensive System of Social Security for South Africa." Draft Consolidated Report (2002) 62.

<sup>931</sup> South African Human Rights Commission *The Right to Food* Fifth Economic and Social Rights Report Series, 2002/2003 (2004) ix.

<sup>932</sup> The South African Human Rights Commission, *The Right to have Access to Sufficient Food*, in 4<sup>th</sup> Economic and Social Rights Report 2001/2002 (2003) 7.

of crime. There is therefore a need to lobby government to introduce BIG as one aspect of a multi-faceted response to realizing the right to food along with other basic needs.

## 7.6 FINAL COMMENTS

This concluding Chapter (and the dissertation as a whole) has considered a possible court challenge of the constitutionality of existing food law, policy and implementation in South Africa. It has also considered an additional multi-faceted approach to realising the right to food indirectly via any avenue which is likely to positively impact on the enjoyment of the right. From the aforementioned proposals it appears as if Brand is absolutely correct to call for a multi-pronged approach to better protect, promote and fulfil the right to food.<sup>933</sup> To be most effective the state's approach to the right to its right to food challenges should have legislative, administrative and judicial elements. In other words, firstly laws need to be created to better meet the right to food; secondly such laws must be properly implemented and finally such implementation must be properly enforced by the courts and other such bodies. A failure at any of these levels could well mean that the state's current food response fail a constitutional challenge. Such a multi-faceted response to South Africa's food challenges could well be encapsulated by way of framework food legislation.

In South Africa effective means need to be developed to close the gap between having the right to food in theory and realisation of the right in practice. Realising the right to food forms part of a broader challenge in this country of meetings all social and economic rights for the many people for whom they remain elusive.<sup>934</sup> This research has suggested what the right to food entails and existing and proposed ways to better achieve this crucial right. Due to the importance of the right, and various other rights being the dependent on it for their realisation, South Africa's food challenges should be urgently prioritized. It is also submitted that the realisation of the right to food is pivotal to South Africa's continued status as a benchmark worldwide for respecting, protecting and promoting human rights.

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<sup>933</sup> Brand "The Right to Food" in Brand and Heyns (eds) *Socio-Economic Rights in South Africa* 178: Citing Committee on ESCR- General Comment No 14.

<sup>934</sup> South African Human Rights Commission *The Right to Food* Fifth Economic and Social Rights Report Series, 2002/2003 (2004) ii.

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